86-715

No. ———

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

October Term, 1986

IN RE FLIGHT TRANSPORTATION CORPORATION SECURITIES LITIGATION

SUBCLASS IV (Unitholders),

Petitioner,

v.

FOX AND COMPANY, REAVIS & McGRATH, et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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1986—Northwest Printing Co., 3010 2nd St. No., Minneapolis, MN 55411—588-7506

76 pp

QUESTIONS PRESENTED

1. Whether in the context of approving class action settlements, the district court ignored the holding in Phillips Petroleum Co. v. Shutts, 472 U.S. ___, 105 S.Ct. 2965, ___, 86 L.Ed.2d 628, 641 (1985) and denied due process of law by imposing financial obligations upon objecting, absent plaintiff class members who have never been served with process and who are without prior notice of the possibility that such obligations might be imposed.

2. Whether by requiring a subclass to accept settlements or to renounce previously approved settlements with other defendants and go to trial against all defendants, the district court coerced a subclass to accept settlements in direct conflict with Evans v. Jeff D., ___ U.S. ___, 106 S.Ct. 1531, L.Ed.2d 747 (1986), petition for rehearing denied, ___ U.S. ___, 106 S.Ct. 2909, 90 L.Ed.2d 995 (1986) and United States v. Swift, 286 U.S. 106, 114-115 (1932).

STATEMENT REQUIRED BY RULE 21(b)

The proceedings in the court below involved the claims of petitioner-appellant Subclass IV (Unitholders) by and through its certified representatives Putnam High Yield Trust, United High Income Fund, Inc., and Oppenheimer High Yield Fund and respondents-appellees Thomas C. Bartsh, Receiver, Fox and Company, Opperman & Paquin and its partners, James F. McGovern, Reavis & McGrath, Norwest Bank Mpls., N.A., Norwest Calhoun-Isles, N.A., American Home Assurance Company, Alexander & Alexander Services, Inc., Alexander & Alexander, Inc., St. Paul Fire & Marine Insurance Co., Ezell Jones, Marjorie Terhaar, Russell T. Lund, Jr., Wardell M. Montgomery, Delbert Oldenburg, Larry Walston, and the following representative plaintiffs of Subclasses I, II, III, and V: Frank P. Antinore, Sid Bader, Dennis Barr, Caroline J. Bender, Barry Bernstein, Dolores and Robert Bezark, James P. Christopher, Sylvester E. Daily, Jr., Ethel Dimicele, James J. Donohue, Ron Fingerhut, Kristi A. Fogarty, Robert L. Gold, Andrew Goodman, Emil Gotschlich, Theodore Herman, Joyce Hill, Ronald Knuth, Dennis A. Koltun, Stanley F. Koutek, Milt Krelitz, Carmen and Eugene Kreuzkemper, Grant Lovelle, James Lovelle, Joseph Mangano, Donald Miller, Phyllis Miller, Gordon Moscoe, Dennis Rease, Phil Richter, Maureen Schleiffer, Richard Schwartzchild, Ann Seaver, Bruce Shankman, Ellyn and Robert Stein, Marvin Steinberg, James Walsh, and Allan Ziskin.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

IN RE FLIGHT TRANSPORTATION CORPORATION SECURITIES LITIGATION.

Subclass IV (Unitholders),

Petitioner,

v.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Subclass IV (Unitholders) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's opinion is reported at 794 F.2d 318 and is set forth in Appendix A. The Eighth Circuit's denial of rehearing en banc is not reported and is set forth in Appendix B. The district court's memorandum opinion and orders are not reported and are set forth in Appendices C, D, E and F.

JURISDICTION

On June 11, 1986, the Eighth Circuit filed its opinion. On July 31, 1986, the Eighth Circuit denied Subclass IV's petition for rehearing and suggestion of rehearing en banc. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE CONSTITUTIONAL PROVISIONS AND RULES OF CIVIL PROCEDURE INVOLVED

The due process clause of the United States Constitution and Rule 23(c) (d) and (e) of the Federal Rules of Civil Procedure are set forth in Appendix G.

STATEMENT

Background information regarding the Flight Transportation Corporation ("FTC") securities litigation stemming from June, 1982 securities offerings is set forth in a previous opinion of the United States Court of Appeals for the Eighth Circuit, In Re Flight Transportation Corp. Securities Litigation, 730 F.2d 1128 (8th Cir. 1984) cert denied 105 S.Ct. 1169 (1985). There, the court of appeals affirmed, with some modification, the district court's approval of the "Sharing Agreement" which settled disputes among claimants to more than $22,000,000 of escrowed proceeds of the securities offerings and provided for the joint prosecution of all further claims.

On May 31, 1983, a notice of class action determination was sent to putative class members informing them in general of the litigation, describing the class and subclasses involved and explaining what a class action is and how to remain a member as well as how to be excluded from the class. The class action notice is set forth in Appendix H. Significantly, the notice stated that: "Remaining a class member will not subject you to any out-of-pocket costs or fees and will enable you to participate in the recoveries obtained pursuant to the Sharing Agreement...." Any member wanting to be excluded from the class had until July 12, 1983 to do so. Finally, the notice described the terms of the Sharing Agreement, including the proposed

resolution of the constructive trust claim to approximately $22,000,000.

The notice made no reference, direct or indirect, to the possibility of class members having any financial obligations imposed upon them should they elect to remain in the class. In July, 1983, the district court certified a class of all purchases of FTC securities between 1979 and 1982 who suffered a loss as a result, with the exception of defendants. The court established five subclasses consisting of four groups of stockholders and Subclass IV, the Unit purchasers which are, in large part, mutual funds, common trust funds of banks and other large financial institutions.

Three years after the certification of the class and court approval of the Sharing Agreement, settlement agreements were reached with Fox & Company ("Fox"), FTC's auditors, and with Reavis & McGrath ("Reavis"), legal counsel to certain underwriters for FTC's public offerings. Contrary to the Sharing Agreement and unlike earlier settlements, the Fox and Reavis settlements contain indemnity provisions which impose affirmative indemnity and legal defense obligations on all claimants under the Sharing Agreement. Subclass IV refused to agree to these settlements because of these provisions.

The Fox Settlement contains an unrestricted indemnity covering all current and potential claims related

either to the securities offering or services provided by Fox. This indemnity covers claims against Fox by any person whether or not such a person is a party to the Sharing Agreement and is enforceable against any settling claimant without any dollar limitation. The agreement contains a broad legal defense provision requiring each of the settling claimants to provide a legal defense for Fox.

The Reavis Settlement provides an indemnity against any judgment obtained against Reavis by any person, whether or not the person is subject to the Sharing Agreement, subject to the limitation that the indemnity will not exceed the amount of $1,600,000 paid in settlement by Reavis. The indemnity permits the

obligation to be fulfilled by judgment reduction but does not prevent direct enforcement of the indemnity obligation against one or more settling claimants.

On September 13, 1985, the district court heard objections to the proposed settlements. Subclass IV objected to the settlements on several grounds including the imposition of financial obligations on Subclass members. In its October 17, 1985 memorandum opinion, the district court imposed these settlements on Subclass IV unless it promptly elected to proceed to trial, renounce all its claims under the Sharing Agreement, and return over $11,000,000 previously distributed to its members.

The Court of Appeals Proceeding

On June 11, 1986, the Eighth Circuit affirmed the judgment of the district court. First, the court of appeals ruled that the trial court's finding that the risk to which the indemnity provisions exposed Subclass IV was tolerable and not clearly erroneous. Next, the appellate court ruled that the district court did not abuse its discretion by in imposing the indemnity provisions on Subclass IV. Finally, the court of appeals ruled that the district court did not force Subclass IV to accept the settlement as it gave Subclass IV the option of going to trial provided it renounced all of its claims of the Sharing Agreement and returned the approximately $11,000,000

distributed to it pursuant to the Sharing Agreement.

Subclass IV petitioned the Eighth Circuit for rehearing en banc on June 25, 1986. The court of appeals denied Subclass IV's petition on July 31, 1986.

REASONS FOR GRANTING THE WRIT

I. THE EIGHTH CIRCUIT'S DECISION IMPOSES FINANCIAL OBLIGATIONS ON CLASS MEMBERS IN VIOLATION OF DUE PROCESS OF LAW AND DECISIONS OF THIS COURT.

This petition raises important questions of federal civil procedure in approving class action settlements. The Eighth Circuit opinion does not address but implicitly rules on a due process of

law issue of critical public importance: Whether a district court has authority to impose affirmative financial obligations on absent plaintiff class members who were never served with process and who are included in the class without prior notice that such obligations could possibly be imposed upon them.

The May, 1983 notice of class action determination gave persons making the decision to remain in or to opt out of the class absolutely no suggestion - remote or otherwise - that they could be subject to any financial obligations. Indeed, it assured them that they would not even be subject to out-of-pocket costs or fees. Now, over three years after the opt out period has expired, class members -

burdened with the Fox and Reavis indemnities imposed upon them by judicial fiat - face financial obligations without ever being served with summons or any other effective form of warning.

This Court has recently held that due process of law strictly circumscribes the burdens which may be placed on absent plaintiff class members and limited the authority of a state court to disposing of the class members underlying claims. In Phillips Petroleum Co. v. Shutts, ___ U.S. ___, 105 S.Ct. 2965, ____, 86 L.Ed.2d 624, 641 (1985), this Court declared:

> Besides this continuing solicitude for their rights, absent plaintiff class members are not subject to other burdens imposed upon defendants. They need not hire counsel or appear. They are almost never subject to counterclaims or cross-claims, or liability for fees and costs. Absent

> plaintiff class members are not subject to coercive or punitive remedies. Nor will an adverse judgment typically bind an absent plaintiff for any damages, although a valid, adverse judgment may extinguish any of the plaintiff's claim which was litigated.

Neither the district court nor the appellate court cited any authority granting a federal court power to impose financial obligations upon absent plaintiff class members who participated in the class action without prior notice that a court might impose liabilities having no relationship to the member's claims. The district court's order involuntarily makes each class member the insurer of Fox and Reavis for the consequences of their wrongdoings. None of the class members were notified at the

time of certification that they were to be insurers of any risks - remote or otherwise - and the district court's October 17, 1985 order does not specify any limit for a class member's exposure.

In addition to constitutional due process issues, the Eighth Circuit's ruling raises a question of exceptional public importance in that it will have a substantial adverse impact upon the utility of the class action device and, therefore, is a question likely to recur in the future. If this opinion stands, notices in all future class actions - unlike the one sent here - will have to disclose clearly to potential class members that if they do not opt out they may be placing their own assets in

jeopardy because a court may order them to be unlimited insurers of defendants' risks. Few potential class members will knowingly remain in the class and subject themselves to an involuntary imposition of potentially unlimited financial exposure.

This Court should grant certiorari to address these important and recurring issues.[1/] Unless reviewed and reversed by this Court, the opinion of the Eighth Circuit will critically impair Rule 23

1/ The opinion of the Eighth Circuit also conflicts with the decision of the United States Court of Appeals for the Seventh Circuit in In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106 (1979), cert. denied, 444 U.S. 870 (1980) (federal district court cannot force class to settle state law claims not pending in the federal action).

actions and seriously erode the opportunities of individuals with small claims to obtain justice.

II. THE LOWER COURTS' COERCIVE IMPOSITION OF THESE SETTLEMENTS CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND SANCTIONS SUCH A DEPARTURE FROM THE ACCEPTED JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The appellate court held that the district court did not abuse its discretion or unlawfully coerce Subclass IV into accepting the Fox and Reavis settlements because it gave Subclass IV the alternative of renouncing all its claims under the Sharing Agreement, returning over $11,000,000 previously distributed Subclass IV members out of the

proceeds of earlier settlements and proceeding to a trial against Fox and Reavis and, presumably, all other defendants.

The district court's novel attempt, approved by the court of appeals, to circumvent the prohibition against court dictated settlements conflicts with at least two decisions of this Court and requires review.

A. The appellate court decision conflicts with Evans v. Jeff D., ___ U.S. ___, 106 S.Ct. 1531, ____, 89 L.Ed.2d 747, 757 (1986) petition for rehearing denied, ___ U.S. ___, 106 S.Ct. 2909, 90 L.Ed.2d 995 (1986) (April 22, 1986). In Jeff D., this Court ruled:

> "Rule 23(e) wisely requires court approval of the terms of any settlement of a class action, but the power to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed. . . . Rule 23(e) does not give the court the power, in advance of trial, to modify a proposed consent decree and order its acceptance over either party's objection. . . . The District Court could not enforce the settlement on the merits and award attorney's fees anymore than it could, in a situation in which the attorney had negotiated a large fee at the expense of the plaintiff class, preserve the fee award and order greater relief on the merits."

Here, the district court imposed such onerous and coercive conditions on the right of Subclass IV to proceed to trial that it effectively and improperly denied Subclass IV any alternative to a court imposition of these two settlements.

While the district court did offer a conditional trial option, it is clear that the option was not a viable one and does not overcome this Court's prohibition against coercive court imposed class settlements. For example, one of the conditions required the return of funds which were created by the settlement of constructive trust claims to more than $22,000,000. Of the proceeds subject to the constructive trust claim, more than $11,000,000 has been distributed to members of Subclass IV. The remainder is held by the Receiver in trust for the Participating Creditors, for the members of the other Subclasses, and for the expenses of prosecution of the litigation. Neither of the lower courts indicated whether such funds would be subject to the constructive

trust claim of Subclass IV or even if Subclass IV's constructive trust claim was "resurrected" by the Court's Order.

Among the many other unresolved complexities presented by the "trial option" was the requirement that Subclass IV breach earlier settlement agreements and proceed to trial against the earlier settling defendants.[2/] Could Subclass

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2/ Other unaddressed complexities include: Would the earlier settling defendants be forced to defend at the trial? Could Subclass IV now assert a bankruptcy claim? What would happen to the funds returned by Subclass IV? Would the forced renunciation create an action for breach of contract by the other parties? Would Subclass IV still be subject to obligations under the Sharing Agreement? How could a Subclass IV member, such as a bank common trust with constantly changing beneficiaries, return already distributed proceeds?

IV exercise the option to go to trial without, for example, obtaining consent to withdraw from settlement agreements with earlier settling defendants? Thus, the trial option offered by the district court was wholly ephemeral. It constituted an arbitrary decree forcing the Fox and Reavis settlements upon Subclass IV even though not a single Subclass IV member agreed to them.

B. The Eighth Circuit's decision also conflicts with this Court's ruling in United States v. Swift, 286 U.S. 106 (1932). There this Court announced that in order for federal court to modify or revoke a previously approved settlement there must be a showing that one of the parties is:

> "suffering hardship so extreme and unexpected as to justify us in saying that they are victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." Id. at 119.

Both the court of appeals and the district court found the Fox and Reavis settlements to be interdependent with earlier settlements which had been finally approved pursuant to Rule 23(e). Without any showing or finding of harm caused by new and unforeseen circumstances mandating a modification of the Sharing Agreement and other earlier settlements, the district court's "trial option" - even if viable - required revocation of all of the earlier settlements as they pertained to Subclass IV.

There is no suggestion or finding that the Sharing Agreement or the earlier settlements have operated in any manner other than as intended by the parties. The district court made no findings whatsoever to support the revocation of the earlier approved settlements. To force Subclass IV to renouce previously approved settlements without any proof that they had become "instruments of wrong" was an abuse of the district court's discretion, approved by the Eighth Circuit, and was contrary to the Swift holding. This warrants review and reversal by this Court.

CONCLUSION

For the reasons set forth above, Subclass IV (Unitholders) respectfully urge that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 29, 1986

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 85-5425, 86-5012

In re Flight Transporation Corporation
Securities Litigation

Subclasses I, II, III (Shareholders),

Appellees,

Subclass IV (Unitholders),

Appellant,

Subclass V, and Thomas C. Bartsch, receiver,

Appellees.

v.

Fox and Company, Opperman & Pacquin, James F. McGovern, American Home Assurance Company, Reavis & McGrath, a Partnership, Norwest Bank Minneapolis, N.A., Norwest Bank Calhoun-Isles, N.A., St. Paul Fire & Marine Insurance Co., Alexander & Alexander Services, Inc., Alexander & Alexander, Inc., Evanston Insurance Company, Exell Jones, Marjorie Terhaar, Russell T. Lund, Jr., Wardell M. Montgomery, Delbert Oldenburg, and Larry Walston,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA.

Submitted: May 14, 1986
Filed: June 11, 1986

Before ARNOLD, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and FAGG, Circuit Judge

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ARNOLD, Circuit Judge.

This is an appeal from orders of the District Court[1] approving a series of settlements made in the Flight Transporation Corporation class-action securities litigation. We hold that the District Court did not abuse its discretion, that it committed no error of law, and that its findings of fact are not clearly erroneous. We therefore affirm.

The background facts are given in our previous opinion, *In re Flight Transporation Corp. Securities Litigation*, 730 F.2d 1128 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 1169 (1985). There, we affirmed with some modifications an order of the District Court approving the "Sharing Agreement," a document which provides for the distribution of money among the creditors and securities holders of Flight Transportation Corporation (FTC), which is in bankruptcy. FTC's securities holders were certified as a class, and this class was divided into five subclasses. Subclass IV, members of which are appellants before us in the present appeal, consisted of purchasers of FTC units, including debentures and stock warrants, under a registration statement dated June 4, 1982. We shall refer to this subclass as Unitholders.

After approval of the Sharing Agreement as modified, the FTC-related litigation proceeded in the District Court. The focus of the litigation, as our previous opinion ex-

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[1]The Hon. Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation as a United States District Judge for the District of Minnesota.

plains, is a charge of fraud or culpable negligence against FTC and others in connection with certain of FTC's securities issues. Vigorous efforts were made to settle remaining claims against groups of defendants. Before us in the present case are proposed settlement agreements between the plaintiffs and five defendants or groups of defendants: (1) Alexander & Alexander, Inc., Alexander & Alexander Services, Inc. (FTC's aircraft insurance carrier), Evanston Insurance Company (FTC's directors' and officers' insurance carrier), and FTC's outside directors; (2) Opperman & Paquin (FTC's outside counsel), American Home Assurance Company (Opperman & Paquin's insurance carrier), and related parties; (3) Norwest Bank Minneapolis, N.A., FTC's primary lender, an affiliate of Norwest Bank, and St. Paul Fire & Marine Insurance Company; (4) Fox & Co. (FTC's auditor) and related parties; and (5) Reavis & McGrath (legal counsel to certain underwriters for FTC public offerings).

Subclass IV, the appellant Unitholders, object to the District Court's order approving these settlements primarily because of a provision obligating the plaintiffs to indemnify and hold harmless the settling defendants against any judgments that may be obtained against them arising out of matters which formed the basis of this litigation. We do not agree that the inclusion of this provision in the settlement agreements in question required the District Court to disapprove them.

In the first place, only two of the settlement agreements, those with Fox & Co. and Reavis & McGrath, contain true indemnity provisions. The other agreements include only a "judgment reduction" provision. In such a provision, a settling plaintiff agrees, in order to settle an action with

defendant A, that any later judgment obtained against defendant B will be automatically reduced by any amount which B recovers over against A by cross-claim or separate action for contribution or indemnity. To this sort of judgment-reduction provision Subclass IV does not seem really to object. Its concern, instead, may be that the District Court's opinion approving the settlements, *In re Flight Transporation Corp. Securities Litigation,* Master Docket No. 4-82-874 (D. Minn. October 17, 1985), seems to treat all of the settlement agreements as containing an indemnity provision properly so-called, that is, a provision which would require a settling plaintiff to indemnify a settling defendant for any recoveries secured against that defendant arising out of the underlying controversy, whether or not the amount of those recoveries exceeded the amount paid by the settling defendant to the settling plaintiff in order to obtain the settlement agreement, or the amount that the settling plaintiff may recover from someone else who in turns recovers over against the settling defendant. To the extent that this is Subclass IV's fear, we can allay it. Except for the Fox & Co. and Reavis & McGrath agreements, we construe the settlement agreements not to contain this kind of indemnity properly so-called, but, rather, to be limited to a simple judgment-recovery mechanism. Such a limited obligation Unitholders seem to concede was within the discretion of the District Court. Appellees class plaintiffs and FTC's receiver agree with this limiting interpretation. Brief of Appellees Class Plaintiffs and the Receiver 5 n. 4.

As to the agreements with Fox & Co. and Reavis & McGrath, which do go beyond a simple judgment-recovery mechanism,[2] the District Court found as follows:

> The Court recognizes the concern that counsel for subclass IV . . . have for the provisions of the settlements which require the plaintiffs to defend and indemnify the defendants for all claims related to matters which formed the basis of the FTC litigation. But while one can conceivably spin out scenarios which would require these provisions to be invoked (the objectors have not done so), the possibility of such scenarios reaching fruition is remote. This litigation has been in progress for well over three years and has been the subject of much public attention. Thus, there is little likelihood that new claims will be asserted. More importantly, however, the proposed settlements, as previously mentioned, call for the defendants to assign to the plaintiffs all claims, cross-claims, etc. that are asserted or may be asserted by the defendants. The claims that will be assigned to the plaintiffs represent a significant portion of the universe of all claims which could be brought against the defendants. This provides real and substantial protection to the plaintiff class members against the possibility of the indemnification provisions being invoked.

Slip op. 7-8. This finding that the risk to which the indemnity provisions expose Subclass IV (and, of that matter, all other members of the plaintiff class) is tolerable, is not clearly erroneous, and we therefore accept it.

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[2]We note, however, that the indemnity obligation contained in the Reavis settlement is more limited than that contained in the Fox settlement. The Reavis indemnity is limited to the $1.6 million it is paying for the settlement.

Subclass IV objects that the risk which it is being required to assume must be worth something, else settling defendants would not have insisted on the inclusion of this provision in the settlement agreements. Appellants further assert that the settlement agreements confer no benefit whatsoever on them, because they have already received, as a result of the Sharing Agreement and related negotiations, almost all of their claims. No additional cash payments, they say, will be forthcoming for them as a result of the settlement agreements. Accordingly, they characterize the agreements as requiring Subclass IV to give up something of value, the indemnification provisions, while receiving nothing whatever in return. This, they say, cannot be fair.

We disagree with this characterization of the lawsuit. The present settlement agreements may not be considered in isolation. They are merely the latest chapter, perhaps the last, in a complex series of suits and negotiations. The Sharing Agreement contemplated further recoveries, whether by judgment or by settlement, and it is not unfair for later settlement agreements adding to the funds created by the Sharing Agreements to take into account previous payments to various members of the plaintiff class, including Subclass IV. The District Court was persuaded that the benefits to Subclass IV were sufficient to justify as fair and reasonable the imposition on that Subclass (and, we again add, on all other members of the plaintiff class) of the risk posed by the indemnity provisions. We cannot say that this decision was an abuse of discretion.

Unitholders argue also that the settlement agreements now before us were concluded in violation of the Sharing Agreement itself, because counsel for Unitholders were not

permitted, they say, to participate in the negotiations leading up to these agreements. The Sharing Agreement, appellants argue, provides that no settlements may be submitted to the District Court for approval without the consent of at least three of the four claimant groups, these groups being Subclass IV, the other class plaintiffs, the receiver, and the creditors. According to appellants, only two of these groups, the other class plaintiffs and the receiver, consented to the submission of these proposed settlements to the District Court. Appellees reply that it does not matter what the course of negotiations was, or whether a procedural provision of the Sharing Agreement was violated in the submission of these proposed settlements, so long as the District Court, after a full and fair hearing at which all objections to the settlement agreements were heard, found that they were fair, reasonable, and adequate. We need not reach the legal merits of this dispute, because now, as a practical matter, we know that three out of four of the relevant groups have approved the settlements. The participating creditors have not appealed the order of the District Court, and therefore must be taken, at least *de facto*, to be in agreement with the settlements approved by that court.[3]

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[3]In support of their claim that Subclass IV was excluded from settlement negotiations and did not consent to the submission of the proposed settlement agreements to the District Court, appellants have submitted a proposed supplemental appendix, together with a motion for leave to file it. This motion is opposed by appellees. The motion for leave to file the supplemental appendix is granted, but, for reasons stated in text, we cannot agree that the matters contained therein, even if all true, require reversal of the District Court's orders. The extent to which counsel for a subclass participated in negotiations leading up to the settlement agreement is certainly a relevant factor to be considered by the District Court in deciding whether the settlement is fair and adequate, but it is not a *sine qua non*, so long as the District Court considered and ruled on all objections voiced by counsel for the objecting subclass, which it clearly did here.

Subclass IV also claims that it is unlawful of the District Court to force it to accept a settlement. Citing Fed. R. Civ. P. 23(c)(4), it points out that a subclass must be treated as a separate class for present purposes, a proposition that appellees do not contest. A class, appellants argue, cannot be required to accept a settlement to which it has not agreed. In this connection, shortly before the argument, appellants called our attention to the following language in *Evans v. Jeff D.*, 54 U.S.L. Week 4359, 4362 (U.S. April 22, 1986):

> Rule 23(e) wisely requires court approval of the terms of any settlement of a class action, but the power to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed. . . . Rule 23(e) does not give the court the power, in advance of trial, to modify a proposed consent decree and order its acceptance over either party's objection. The options available to the District Court were . . .: it could have accepted the proposed settlements; it could have rejected the proposal and postponed the trial to see if a different settlement could be achieved; or it could have decided to try the case.

We see no violation of these principles in the action taken by the District Court here. Its opinion gave Subclass IV the option of going to trial. "The court takes this opportunity to inform the objecting parties that they may proceed to trial on their claims . . . ." *In re Flight Transportation Corp. Securities Litigation, supra,* slip op. 8. Subclass IV

complains that no real option was given it, because the District Court also said that the parties could not both proceed to trial and retain the benefits that they had derived from the Sharing Agreement. "Any trial of this matter will be conditional upon the renunciation by the parties desiring a trial of their claims under the Sharing Agreement and the return of any monies distributed to date. Simply stated, the objecting parties cannot claim to be parties to the proposed settlements for one purpose and not parties for another." *Ibid.*

We see no coercion or impropriety in this language. It would certainly not have been fair to permit Subclass IV, which to date has received over $11,000,000 in cash, much more than received by other members of the plaintiff class, to retain this money while also rejecting the present settlements. As indicated above, the Sharing Agreement and the present settlement agreements cannot be viewed as isolated from each other. They are chapters in a continuing story, all of the parts of which are interdependent. When Subclass IV accepted substantial cash payments under the Sharing Agreement, it knew that further settlement negotiations would be taking place against certain defendants, and that the results of these negotiations would be submitted to the District Court for approval. The requirement of court approval protected it against unfair imposition, and, as a last resort, the Subclass also retains the right to go to trial against the settling defendants, provided always that it may not take the benefit of this course of settlement negotiations without also assuming the burdens which other members of the plaintiff class have assumed.

In short, we find no error of law, abuse of discretion, or clearly erroneous finding of fact in the actions of the Dis-

trict Court. The orders of that court approving the various settlement agreements in question on this appeal are therefore

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 85-5425 & 86-5012-MN

In Re Flight Transportation Corporation
Securities Litigation

Subclasses I, II, III (Shareholders), et al.,

Appellees.

v.

Subclass IV (Unitholders),

Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Appellant's petition (Subclass IV — United Holders) for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

July 31, 1986

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In Re FLIGHT TRANSPORTATION CORPORATION SECURITIES LITIGATION

Pretrial Order No. 250
MASTER DOCKET NO. 4-82-874
MDL NO. 517

MEMORANDUM OPINION

WEINER, J.[1] OCTOBER 17, 1985

The Flight Transportation Corporation ("FTC") Securities Litigation, MDL 517, was, at one time, comprised of over 54 lawsuits, including actions brought against the company's officers and directors, its outside counsel, its auditors, its major lenders, its insurers, the underwriters for each of the company's four public offerings, and counsel to the underwriters for three of the public offerings. While plaintiffs and defendants may disagree with respect to the identity of the parties bearing responsibility for the FTC debacle, there can be no doubt that numerous innocent victims were the subject of a fraud of major proportions.

Presently pending before the court are proposed settlement agreements between the plaintiffs and the following parties: (1) Laidlaw Adams & Peck, Inc. (principal underwriter of the March 2, 1981 FTC public offering); (2) Alexander & Alexander, Inc. and Alexander and Alexander

[1]Judge Weiner, a district judge in the Eastern District of Pennsylvania, is sitting by designation.

Services, Inc. (FTC's aircraft insurance carrier), Evanston Insurance Company (FTC's directors and officers insurance carrier), FTC's outside directors, Ezell Jones, Wardwell M. Montgomery, Russell T. Lund, Jr., Larry Walston, Delbert Oldenburg, and Marjorie Terhaar and Jack Adams, Jr.; (3) Opperman & Paquin, a partnership, McGovern, Opperman and Paquin, a partnership, James E. Schatz and Joseph R. Kernan (FTC's outside counsel), James F. McGovern and American Home Assurance Company (Opperman & Paquin's insurance carrier); (4) Norwest Bank of Minneapolis, N.A. and Norwest Bank Calhoun Isles, N.A. (FTC's primary lenders) and St. Paul Fire & Marine Insurance Company; (5) Fox & Co., John E. Harrington, Norman E. Klein, Mark Mersman and all present and former partners, employees, and agents of Fox & Co. (FTC's auditor for the fiscal years ending June 30, 1979, June 30, 1980, and June 30, 1981); and, (6) Reavis & McGrath (counsel to certain underwriters for the March, 1981 and June, 1982 FTC public offerings.) Approval of the proposed settlements would effectively bring this most complex litigation to a close, leaving only matters such as fee applications and claims administration.[2]

On September 13, 1985, the court held a hearing to afford interested parties an opportunity to voice objections

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[2]The court has previously given its approval to two other settlements. The first agreement was reached with William Rubin, former Chairman of the Board and Chief Executive Officer of FTC, and his estranged wife, Joyce.

The second agreement was reached with Drexel Burnham Lambert Incorporated and Mosely, Hallgarten, Estabrook & Weeden, Inc., principle underwriters of the FTC June 3, 1982 public offering and sole underwriters of the FTC June 4, 1982 public offering. This settlement has been appealed to the United States Court of Appeals for the Eighth Circuit by a member of plaintiff subclass V, Selected Special Shares, Inc. Oral argument has been deferred pending a possible resolution of the matter.

to the proposed settlements. Four parties filed objections to the settlements and were heard by the court. Two included participating creditors, Federal Deposit Insurance Corporation, as successor in interest to Continental Bank & Trust Company of Chicago, and Greyhound Leasing and Financial Corporation. The other two objectors include counsel for subclass IV and the same member of subclass V who objected to the Drexel settlement, Selected Special.[3] A member of the Plaintiffs Steering Committee was heard in support of the proposed settlements.

The recoveries generated from the proposed settlements, together with money already in the hands of the receiver, would bring the total amount of money available for distribution to over $52 million. In addition to the monetary aspect of the proposed settlements, other salient features that are common to each of them can be summarized as follows:

1. The plaintiffs agree to dismiss the defendants from the litigation and release them from all claims which were or could have been asserted against them.

2. The plaintiffs agree to provide the defendants with

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[3]The reference to "participating creditors" and various "subclasses" is derived from the Sharing Agreement, a document which, *inter alia*, provides for the distribution of monies among the creditors and securities holders of FTC. *See generally In Re Flight Transportation Corporation Securities Litigation*, 730 F.2d 1128 (8th Cir. 1984) (affirming this court's approval of the Sharing Agreement), *cert. denied*, 105 S.Ct. 1169 (1985). Under the Sharing Agreement, recoveries were divided into two funds. Fund A is comprised of an escrow fund (created when the proceeds of FTC's last public offering were impounded pursuant to a temporary restraining order) and assets of FTC. Fund B is comprised of all other recoveries. Participating creditors refer to those creditors who can participate in, i.e. receive distribution from, Fund B. Excluded from participating creditors are defendants in this litigation.

The Sharing Agreement also divided the securities holders into five subclasses. Membership in a subclass is keyed to the particular public offering from which the holder purchased the securities. The Sharing Agreement sets forth a schedule for the allocation of monies among the various subclasses.

a legal defense to all claims which may be asserted against the defendants arising out of matters which formed the basis of this litigation.

3. The plaintiffs agree to indemnify and hold harmless the defendants for any judgments that may be obtained against the defendants arising out of matters which formed the basis of this litigation. (This provision is not a part of the Laidlaw settlement.)

4. The defendants agree to assign to the plaintiffs all claims, cross-claims, etc. held by the defendants arising out of matters which formed the basis of this litigation.

The principal concern of three of the objectors, counsel for subclass IV and the two participating creditors, lies with those portions of the proposed settlements which require the plaintiffs to defend and indemnify the defendants. They contend that these provisions place an unacceptable risk of personal liability being imposed on the plaintiffs. They point out that since several of the principals of FTC have taken the Fifth Amendment, all of the facts surrounding this litigation are not yet known. They assert that facts may emerge from the forthcoming criminal trial of the FTC principals which may cause additional actions to be filed against the defendants. The three objectors find his situation particularly troublesome in light of the fact that the six year Minnesota statute of limitations will not be tolled for almost another three years.

Selected Special objects to the proposed settlements on the grounds that "such settlements are not fair, reasonable and adequate with respect to the interests of Selected . . . particularly to the extent such settlements . . . are inconsistent with or contrary to the terms and scheme of allocation and distribution set forth in the Sharing Agreement."

[Selected Special's Objection to Proposed Settlement at 1-2]. The heart of Selected Special's objection concerns uncertainty over how much money it will receive after claims of higher priority are paid.

There are a number of factors a court should consider in evaluating a proposed settlement. These include: (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *City of Detroit v. Grinnel Corporation,* 495 F.2d 448, 463 (2d Cir. 1974).

The settlements presently before the court were reached as a result of arduous and lengthy negotiations. The recoveries generated by this process have contributed to establishing a fund, which, by conservative estimates, will allow many of the injured parties to recoup up to 90% of their losses. The plaintiff's damage estimates for this case ranged between 50 and 55 million dollars. Thus, the settlement fund, which, as previously stated, totals in excess of $52 million, falls well within the plaintiffs' best estimates of the value of the case.

On the other hand, plaintiffs' claims of liability against each of the settling defendants are not equally strong. Plaintiffs' Section 11 and 12(2) claims against certain defendants assert secondary or control person liability. Plaintiffs' Section 10(b) claims require a showing of scienter. Such claims

may involve difficult proof problems or present novel issues of law which will form the basis of an appeal.[4] In view of the risks associated with proceeding to trial, particularly when measured against the almost unprecedented rate of recovery for this kind of litigation, approval of the proposed settlements is strongly indicated.

The objections raised to the proposed settlements do not persuade this court otherwise. The court recognizes the concern that counsel for subclass IV and the two participating creditors have for the provisions of the settlements which require the plaintiffs to defend and indemnify the defendants for all claims related to matters which formed the basis of the FTC litigation. But while one can conceivably spin out scenarios which would require these provisions to be invoked (the objectors have not done so), the probability of such scenarios reaching fruition is remote. This litigation has been in progress for well over three years and has been the subject of much public attention. Thus, there is little likelihood that new claims will be asserted. More importantly, however, the proposed settlements, as previously mentioned, call for the defendants to assign to the plaintiffs all claims, cross-claims, etc. that are asserted or may be asserted by the defendants. The claims that will be assigned to the plaintiffs represent a significant portion of the universe of all claims which could be brought against the defendants. This provides real and substantial protec-

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[4]For example, the scienter requirement — that the defendants had actual knowledge of or recklessly ignored material facts which should have been disclosed — presents a difficult proof problem because many of the defendants claim that they relied on other defendants. The control person liability claims could form the basis of a legal issue on appeal because certain defendants have insisted that in order to maintain such a claim, a showing of "culpable participation" is required. *See e.g., Antinore v. Alexander & Alexander Services, Inc.*, 597 F.Supp. 1353, 1360 (D. Minn. 1984). The Eighth Circuit has not had the opportunity to squarely address this issue.

tion to the plaintiff class members against the possibility of the indemnification provisions being invoked.

The participating creditor and subclass IV objectors have also taken the position that since they are not signatories to the proposed settlement agreements, the court cannot "impose" the terms of the settlements on them without their consent. The objectors urge a change in the indemnity provisions of the settlements to language similar to a judgment reduction provision contained in the Drexel settlement. That failing, they desire the case to proceed to trial.

The court takes this opporunity to inform the objecting parties that they may proceed to trial on their claims and that such trial will be held in January, 1986. However, the parties cannot both proceed to trial and reap the benefits that are derived from the settlements. Any trial of this matter will be conditional upon the renunciation by the parties desiring a trial of their claims under the Sharing Agreement and the return of any monies distributed to date. Simply stated, the objecting parties cannot claim to be parties to the proposed settlements for one purpose and not parties for another.

The court also finds the objection of Selected Special to be without merit. Its concern over the percentage payout of its claim is grounded in the low priority its claims are given under the Sharing Agreement. Thus, its objection is the product of the Sharing Agreement and not the result of any unfairness in the settlements presently before the court.

The court finds the proposed settlements fair, adequate, and reasonable. Appropriate orders approving the settlements accompany this Memorandum Opinion.

/s/ CHARLES R. WEINER
Charles R. Weiner

Filed Oct. 25, 1985
Francis E. Dosal, Clerk
By S. W.
Deputy

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In Re FLIGHT TRANSPORTATION CORPORATION SECURITIES LITIGATION

Master Docket No. 4-82-874
MDL No. 517

PRETRIAL ORDER NO. 250

WEINER, J. OCTOBER 17, 1985

The parties desiring to proceed to trial of this matter shall notify the court within ten (10) days of the filing of this order. No distribution of any monies shall be made to any of the pa ties until such time as the trial of these issues has been completed.

IT IS SO ORDERED.

/s/ CHARLES R. WEINER
Charles R. Weiner

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
FOURTH DIVISION

IN RE FLIGHT TRANSPORTATION
CORPORATION SECURITIES LITIGATION

Master Docket No. 4-82-874
M.D.L. 517

PRETRIAL ORDER NO. 253

ORDER AND JUDGMENT APPROVING THE SETTLEMENT WITH FOX & COMPANY, JOHN E. HARRINGTON, NORMAN E. KLEIN, AND MARK MERSMAN PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 23 AND 54(b)

The terms used herein shall have the same meanings as set forth in the Settlement Agreement Between Certain Claimants and Fox & Company, John E. Harrington, Norman E. Klein, and Mark Mersman (individually as representatives of the Defendant Settlement Class defined therein) (hereinafter "Fox Settlement"). Pursuant to Pretrial Order No. 237, notice of the Fox Settlement was sent to all members of the Plaintiff Settlement Class. On 7/31, 1985, a summary notice regarding the Fox Settlement was published in *The Wall Street Journal*, national edition.

The Fox Settlement, executed by the Settling Claimants and Fox, was filed with the Court on 7/10, 1985, and preliminarily approved by the Court on 7/11, 1985.

Upon thorough consideration of the Fox Settlement, all affidavits, memoranda, and other documents submitted in support thereof, and in opposition thereto, and after consideration of all objections to the Fox Settlement, the Court

finds that the Fox Settlement is fair, adequate and reasonable.

THEREFORE, IT IS ORDERED that:

(1) The Consolidated Action and all Other Actions by Settling Claimants and the Plaintiff Settlement Class against Fox are dismissed with prejudice on the merits and without costs as to Fox;

(2) Fox is discharged from any and all claims, demands and causes of action which have been or could have been asserted against it by the Settling Claimants and Plaintiff Settlement Class, arising out of or relating to the Consolidated Action or Multi-District Litigation;

(3) Settling Claimants and the Plaintiff Settlement Class are permanently barred and enjoined from asserting against Fox any claim, demand, right or cause of action arising out of or relating to the Consolidated Action or Multi-District Litigation;

(4) This Court retains jurisdiction over these settlements and their effectuation;

(5) The Receiver is authorized to enter into the Fox Settlement and effectuate the terms thereof; and

(6) The Court finds that there is no just reason for delay and directs that judgment be entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Dated: 10/17/85

Filed Oct. 25, 1985
Francis E. Dosal, Clerk
By S. W.
Deputy

ENTER:
/s/ CHARLES R. WEINER
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

IN RE FLIGHT TRANSPORTATION
CORPORATION SECURITIES LITIGATION
FRANK P. ANTINORE, ET AL.,

vs.

REAVIS & McGRATH, A Partnership.
Master Docket No. 4-32-874
Civil Action No. 4-83-435

Judge Charles R. Weiner

FINAL ORDER

PRETRIAL NO. 254

This case came on for hearing on plaintiffs' complaint and on the motion of plaintiffs and defendant Reavis & McGrath for approval of a Settlement Agreement, and notice having been duly given to all members of the class as described herein, and all interested parties having been afforded an opportunity to be heard, and the Court, being fully advised in the premises, finds as follows:

A. All of the following described persons, except those who have submitted written requests for exclusion, are members of the class pursuant to Rule 23 of the Federal Rules of Civil Procedure and are bound in all respects by this Judgment:

> All persons who purchased FTC securities during the period from November 30, 1979, to June 18, 1982, and suffered a loss from such purchase. Excluded

from the Settlement Class are Reavis & McGrath and all defendants in any related action; all members of the immediate families of any individuals excluded from the Settlement Class herein; all partners, officers, and/or directors of Reavis & McGrath or of any other entities excluded from the Settlement Class herein; all entities in which Reavis & McGrath or any other individual or entity excluded from the Settlement Class herein has a controlling interest; all persons who purchased or otherwise own any FTC securities on behalf of Reavis & McGrath or any other individual or entity excluded from the Settlement Class herein; and all other individuals or entities found culpable of wrongdoing in any related action.

B. The named plaintiffs in this case, who have been designated as representatives of the class described herein, and the Class Counsel have fairly and adequately represented the interests of the class described herein and the class and subclasses which were certified in the Consolidated Action (case no. 4-82-874).

C. Proper notice has been given in accordance with Rule 23 of the Federal Rules of Civil Procedure.

D. The terms and conditions of the Settlement Agreement Between Certain Claimants and Reavis & McGrath are fair, reasonable and adequate to the Settling Claimants as defined therein and all such terms and conditions are lawful, binding and enforceable with respect to all Settling Claimants and Reavis & McGrath. A copy of the Settlement Agreement is attached hereto and incorporated herein.

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The Court approves the proposed settlement of this case pursuant to the Settlement Agreement as fair, reasonable and adequate.

2. The case of *Frank P. Antinore, et al. v. Reavis & McGrath,* case no. 4-83-435 in the United States District Court for the District of Minnesota, Fourth Division (hereinafter "Reavis action") is dismissed with prejudice and without costs and on the merits as to all members of the class described herein, except those who have submitted written requests for exclusion.

3. Each class member as to whom the Reavis action is dismissed with prejudice and each Settling Claimant as defined in the Settlement Agreement are barred and permanently enjoined from initiating, filing, prosecuting or pursuing any actions against Reavis & McGrath, its past, present and future partners, associates, employees and agents which such member and Settling Claimant ever had, now have, or hereafter may have, whether directly, by assignment or otherwise, which were asserted in, or which arose or might arise out of or in connection with any fact or matter alleged or referred to in the complaints in the Reavis action and the Consolidated action and any other action arising out of or relating to Flight Transportation Corporation, against any person, regardless of whether such claims have heretofore been specifically pleaded. This injunction includes, without limitation, all such individual and class claims; all such allegations of conduct, omissions or damages occurring in whole or in part between November 30, 1979 and June 18, 1982; all such claims arising

under the laws of any jurisdiction, including without limitation all federal and state securities laws, statutory law and common law and all claims heretofore or hereafter assigned to the Settling Claimants by or on behalf of Drexel Burnham Lambert Incorporated, Moseley, Hallgarten, Estabrook & Weeden, Inc., Merchants Investment Counseling, Inc., Merchants National Bank and Trust Company of Indianapolis, Keystone Custodian Funds, Inc., Federal Insurance Company and by or on behalf of any other person or entity. Each such class member and Settling Claimant is adjudged to have settled all such claims against Reavis & McGrath as fully and completely as though that class member and Settling Claimant had executed and delivered to Reavis & McGrath general releases.

4. Any person or entity that has duly requested exclusion from the class may hereafter pursue only his own individual claims, if any, and not any class actions based upon his individual claims.

5. This Court retains jurisdiction to enforce and administer all terms and provisions of the Settlement Agreement and any matters which may arise therefrom.

6. In the event that this Final Order is not otherwise final and appealable, the Court finds that there is no just reason for delay and directs that judgment be entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Date: 10/17, 1985

Filed Oct. 25, 1985
Francis E. Dosal, Clerk
By S. W., Deputy

ENTER:
/s/ CHARLES R. WEINER
District Judge

APPENDIX G

The pertinent provision of the Fifth Amendment to the United States Constitution states: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

The pertinent provisions of Rule 23 of the Federal Rules of Civil Procedure states:

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in

an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and who the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the presentation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

IN RE: FLIGHT TRANSPORTATION
CORPORATION SECURITIES LITIGATION
MASTER DOCKET NO. 4-82-874
M.D.L. No. 517

Honorable Charles R. Weiner

IMPORTANT

NOTICE OF CLASS ACTION DETERMINATION AND HEARING TO APPROVE PROPOSED PARTIAL SETTLEMENTS

This is an official court notice to inform you about a class action lawsuit in which you are apparently a class member so that you may decide: (1) whether to remain as a class member or exclude yourself and, (2) if you elect to stay a class member, what you wish to do with respect to the proposed partial settlement of this action described below.

Notice to Brokers and Other Nominees: If you purchased Flight Transportation Corporation ("FTC") securities during the period November 30, 1979, to June 18, 1982, for another person, now hold such securities for another or are acting as administrator or executor for one who owned FTC securities, you are required to inform the beneficial owners of such securities or any heirs or other persons who might assert a claim for losses sustained on such securities, of the

pendency and partial settlement of this class action. You may obtain additional copies of this Notice from Karl L. Cambronne, Chestnut & Brooks, P.A., 900 Norwest Midland Bldg., Minneapolis, MN 55401. Plaintiffs will not be required to pay any bank, brokerage house, or other nominee any money for expenses incurred in the transmittal of this Notice to beneficial owners, owners, heirs, or other persons.

DESCRIPTION OF THIS LAWSUIT

1. *Background*

In June of 1982, the United States Securities and Exchange Commission ("SEC") filed a lawsuit in the United States District Court, District of Minnesota, against FTC and its president, William Rubin, alleging violations of federal securities laws. The SEC sought an injunction against further violations and disgorgement of unlawfully obtained funds.

The consolidated class action lawsuit which is the subject of this Notice is the result of many individual complaints filed in or shortly after June of 1982 by people who held securities or were creditors of FTC. Most of the individual lawsuits have been consolidated for coordinated pretrial proceedings before the Honorable Charles R. Weiner, United States District Judge, Eastern District of Pennsylvania, sitting by designation in the United States District Court, District of Minnesota.

2. *Plaintiffs' Claims*

The Consolidated Complaint filed herein combines the allegations made by FTC security holders in their individual complaints. A separate class action Complaint has been filed

by certain mutual funds who also invested in FTC. These two Complaints allege that between November 30, 1979, and June 18, 1982, FTC and other defendants, including its auditors, underwriters, officers, attorneys, and directors, engaged in an ongoing plan and scheme to defraud the investing public by means which included materially false statements in public documents and material omissions of fact from public documents, including Annual Reports and Registration Statements filed with the SEC. Plaintiffs allege that FTC and other defendants violated, among other statutes, section 11 of the Securities Act of 1933 and section 10(b) of the Securities Exchange Act of 1934, and that they committed common law fraud and breached contracts with plaintiffs. The plaintiffs seek to recover on their own behalf, and on behalf of a Class of all similarly situated persons, damages for losses resulting from the alleged illegal conduct.

3. *Defendants' Responses*

Except for FTC, the defendants have denied the material allegations of the Complaints. Several defendants have also counterclaimed against FTC and its co-defendants, claiming that such counterdefendants are principally responsible for any illegal activities and should bear principal responsibility for any damages resulting therefrom.

4. *The Bankruptcy and Constructive Trust Issue*

At the SEC's request, the Court appointed a Receiver for FTC. He holds all of FTC's assets and approximately $24 million received by FTC in June of 1982 following two public securities offerings by FTC (the "Escrow Account"). The Receiver is liquidating FTC's assets.

On June 29, 1982, certain creditors of FTC filed an involuntary bankruptcy petition against FTC and seek to use FTC's assets to satisfy their claims. Certain FTC security holders opposed bankruptcy jurisdiction over the Escrow Account and maintained that the Escrow Account should be used by the District Court to satisfy their claims. Subclasses III and IV, described below, sought a constructive trust on the Escrow Account and requested the immediate return of such funds. The constructive trust was opposed by certain creditors and the Receiver.

THE COURT EXPRESSES NO OPINION ON THE MERITS OF ANY OF THE CLAIMS OR DEFENSES IN THIS LAWSUIT

PART ONE: NOTICE OF PENDENCY OF CLASS ACTION

DESCRIPTION OF THE PRELIMINARY PLAINTIFF CLASS AND SUBCLASSES

All FTC security holders are allied in their goal of establishing violations of securities and other laws by FTC and other defendants. However, all may not have identical interests in these proceedings. Accordingly, the Court has preliminarily determined that the Complaints may be maintained as class actions for purposes of the partial settlement described herein, with the following Class and Subclasses, which accommodate potentially competing interests of Subclasses of FTC security holders.

CLASS. All persons who purchased FTC securities during the period from November 30, 1979, to June 18, 1982, and suffered a loss from such purchase, excluding all defendants named in the consolidated action or any related actions;

all members of the immediate families of any individuals named as defendants therein, or of any other individuals excluded from the class defined therein; all partners, officers, and/or directors of any entities named as defendants therein, or of any other entities excluded from the class defined therein; all entities in which any defendant, or any other individual or entity excluded from the class defined therein, has a controlling interest; all persons who purchased or otherwise own any FTC securities on behalf of any defendant therein, or any other individual or entity excluded from the class defined therein; and all other individuals or entities found culpable of wrongdoing in the consolidated action or any related action.

Subclass

SUBCLASS I

Definition

All Class Members who purchased, directly or in the aftermarket, common stock of FTC issued pursuant to a Registration Statement declared effective by the SEC on or about November 30, 1979.

Representative(s) Counsel

Allan Ziskin — John A. Cochrane, Cochrane & Bresnahan, 360 Wabasha St., Suite 500, St. Paul, MN 55102; Daniel W. Krasner, Wolf Haldenstein, Adler Freeman & Herz, 270 Madison Avenue, New York, NY 10016.

SUBCLASS II

All Class Members who purchased, directly or in the aftermarket, common stock and/or warrants to pur-

chase common stock of FTC offered as units of securities of FTC, each unit consisting of one share of common stock of FTC and one half of a warrant to purchase one share of common stock of FTC, issued pursuant to a Registration Statement declared effective by the SEC on or about March 2, 1981.

Stanley Koutek — John A. Cochrane.

Dennis Barr — Daniel W. Krasner.

SUBCLASS III

All Class Members who purchased, directly or in the aftermarket, common stock in FTC issued pursuant to a Registration Statement declared effective by the SEC on June 3, 1982.

Denis A. Koltun, Bruce Shankman, R. I. Schwarzschild, Dolores and Robert Bezark — Lowell E. Sachnoff, Sachnoff, Weaver & Rubenstein, Ltd., One IBM Plaza, Chicago, IL 60611; Jack L. Chestnut, Chestnut & Brooks, P.A., 900 Norwest Midland Bldg., Minneapolis, MN 55401.

SUBCLASS IV

All Class Members who purchased, directly or in the aftermarket, debentures and/or warrants to purchase common stock of FTC offered as units of securities of FTC, each unit consisting of a $1,000 principal amount 11¼% Sinking Fund Debenture due June 1, 1995, and warrants to purchase 57 shares of FTC common stock, issued pursuant to a Registration Statement declared effective by the SEC on June 4, 1982.

Putnam High Yield Trust, United High Income Fund, Inc., Oppenheimer High Yield Fund — James C. Diracles, Best & Flanagan, 4040 IDS Center, Minneapolis, MN 55402.

SUBCLASS V

All Class Members who are not included in any of Subclass I, II, III, or IV, defined above.

Ronald Knuth, Emil Gotshlich — John A. Cochrane, Daniel W. Krasner, Thomas P. Gallagher, 1500 Midwest Plaza West, Minneapolis, MN 55402.

1. *What is a Class Action*

A class action is a lawsuit in which one or more named plaintiffs bring suit on behalf of themselves and all other persons who are similarly situated. The result reached in the lawsuit, whether favorable or not, is binding on all members of the class who do not exclude themselves. If the plaintiffs are successful, all qualifying class members who have not excluded themselves will share in any money recovered. If a class member excludes himself and the lawsuit is successful, then he will not share in any money recovered by the plaintiffs. If a class member excludes himself and the lawsuit is not successful, he will not be bound by such result.

2. *How to Stay in this Class Action*

If you desire to remain as a member of the Class in this lawsuit, you do not have to do anything. If you remain a member of the Class, you will be represented by the Plaintiffs' Steering Committee, comprised of the lawyers set forth above.

Remaining as a class member will not subject you to any out-of-pocket costs or fees *and* will enable you to participate

in the recoveries obtained pursuant to the Sharing Agreement, as described in PART TWO, below. You may enter an appearance in this action through your own attorney, but at your own expense.

3. *How To Be Excluded From the Class*

Any member of the Class may be excluded, but only upon specific request. If you wish to be excluded from the Class, you must submit a written request for exclusion, postmarked no later than July 12, 1983, to: Clerk of the Court, United States District Court, District Court of Minnesota, P.O. Box 9837, Minneapolis, MN 55440. If you submit a request for exclusion, it must include your name and address and state that you request exclusion. To be excluded from the Class you must file a request for exclusion even if you have filed a lawsuit based on an FTC-related claim. The request for exclusion need not state the reason you desire to be excluded. Both the request for exclusion and the envelope containing it should clearly indicate: "In re: Flight Transportation Corporation Securities Litigation; Master Docket No. 4-82-874."

THE COURT CANNOT ADVISE YOU AS TO WHETHER YOU SHOULD EXCLUDE YOURSELF FROM THE CLASS.

4. *Keep Your Address Current*

If you remain as a member of the Class, you are requested to notify the Clerk of the Court (see paragraph 3, above) of any changes in your address.

5. *Court Files Available*

The Court files in this lawsuit are available for inspection during regular office hours at the Office of the Clerk of the Court, United States District Court, District of Minnesota, 110 South Fourth Street, Minneapolis, MN.

PART TWO: NOTICE OF HEARING AND SUMMARY OF PROPOSED PARTIAL SETTLEMENTS

Partial settlements of this lawsuit have been proposed to the Court. The Court must approve the partial settlements before they become effective. The proposed partial settlements have two basic parts: (1) The Sharing Agreement, and (2) the Settlement Agreements with William Rubin and Joyce Rubin.

1. *The Sharing Agreement*

As set forth above, creditors of FTC, persons who purchased common stock directly from FTC, persons who purchased common stock in the open market, and holders of FTC debentures each may have different legal claims against FTC and other defendants. Some claims may be mutually exclusive or conflicting. The principal conflict is between persons who acquired FTC securities in June, 1982, pursuant to FTC's public offerings on June 3 and 4, 1982, and who seek a constructive trust, and creditors of FTC, parties such as a trustee in bankruptcy or Receiver whose responsibility is the conservation of FTC's assets (hereinafter referred to as a "Trustee") and persons who acquired FTC stock in some other manner, who oppose the constructive trust. To avoid the cost, delay, and uncertainty of litigation of such competing claims, certain major creditors of FTC,

counsel for each Subclass, and the Receiver have entered into the Sharing Agreement, which is expected to be entered into by any Trustee who may later be appointed. Its principal features may be summarized as follows:

(a) Under the Sharing Agreement, participating creditors, FTC security holders, and the Trustee will not further litigate competing claims and will cooperate in jointly prosecuting all of their claims against defendants through a Claimants' Committee comprised of representatives from each Subclass, Receiver, and participating creditors of FTC;

(b) All money recovered from defendants, the Escrow Account, and the liquidation of FTC's assets will be deposited into a central fund;

(c) Under supervision of the Claimants' Committee and the Court, creditors and members of the Class will be allocated amounts from the central fund to be applied in payment of their claims against FTC and other defendants. Allocation of money recovered from defendants, including funds transferred by the Court from the Escrow Account and the assets of FTC, will be as follows:

(1) The initial $25,000,000:

CREDITORS	$11,000,000
SUBCLASSES I and II	500,000
SUBCLASS III	1,250,000
SUBCLASS IV	11,000,000
SUBCLASS V	500,000
EXPENSE FUND	750,000

(2) The next $5,000,000:

CREDITORS	$1,500,000
SUBCLASSES I and II	500,000
SUBCLASS III	1,000,000
SUBCLASS IV	1,500,000
SUBCLASS V	500,000

(3) The next $5,000,000:

CREDITORS	$1,800,000
SUBCLASSES I and II	—0—
SUBCLASS III	500,000
SUBCLASS IV	2,700,000
SUBCLASS V	—0—
	$35,000,000

(4) Any money recovered in excess of $35 million will be allocated to participating creditors and Subclasses III and IV until they have received 95% of their out-of-pocket damages approved by the Court. At that time, additional recoveries will be allocated to Subclasses I, II, and V, until they, too, have received 95% of such damages. After all groups of Claimants have received 95% of such damages, all groups will share in additional recoveries until each group receives 100% of its out-of-pocket damages. Recoveries exceeding 100% of claimants' out-of-pocket damages,

if any, will be applied as appropriate to Court-approved expenses, interest, and attorneys' fees and further distributions distributed to claimants;

(5) The $750,000 Expense Fund set forth in subparagraph (c)(1), above, will be used to pay out-of-pocket court costs and expenses incurred in prosecuting this action;

(6) After $40 million has been recovered, an amount to be approved by the Court may be reserved to pay Court-approved attorneys' fees and costs.

NOTE: Under the Sharing Agreement, Class Members will recover money according to the schedules above, and are:

(a) Compromising their constructive trust claim against the Escrow Account;

(b) Giving up their right to file claims in Bankruptcy Court as holders of FTC securities;

(c) Agreeing to turn over any separate recoveries they might obtain to be shared with the other claimants; and

(d) Assigning all of their claims against other defendants for common prosecution by the Claimants' Committee.

2. *The Proposed Settlement Agreements With William Rubin and Joyce Rubin*

The second principal element of the proposed partial settlement are the Agreements of Settlement Between Claimants and Settling Defendants — Number One — William Rubin, and — Number Two — Joyce Rubin ("Settlement Agreements"). Pursuant to the settlement with William Rubin the following will occur: (a) he will turn over to the

Receiver all of his assets, excluding certain items of personal property, but including all of his interest in FTC and its subsidiaries; (b) his lawyer will be allowed to petition the Court for up to $250,000 for fees and expenses incurred in representing him in this action and possible future criminal proceedings; (c) he will provide certain assistance to the Claimants' Committee in prosecuting further actions against other defendants; and (d) he will be released from certain claims against him brought by parties to the Sharing Agreement.

The proposed settlement with Joyce Rubin, William Rubin's wife, is as follows: Joyce Rubin has filed a divorce complaint in the Minnesota state courts seeking one-half of William Rubin's assets. Under the proposed settlement with her, Joyce Rubin and all other members of her family: (a) will release or waive all claims against FTC and the assets of William Rubin that will be turned over to the Receiver in connection with William Rubin's settlement as set forth above; (b) will assign to the Claimants' Committee all of their claims against William Rubin and cease to assert any further claims in this litigation against William Rubin, FTC, or anyone else; (c) will cooperate with the Claimants' Committee in the prosecution of this litigation against the other defendants; (d) will receive assets valued at approximately $607,000 subject to certain liens; and (e) certain of Joyce Rubin's attorney's fees will be paid and she will receive child support payments, with total payments amounting to approximately $55,000.

3. *Value of the Settlements*

Under the Sharing Agreement it is contemplated that appropriate orders will be sought from the Court directing the

Receiver to turn over to the Claimants' Committee the assets of FTC, valued at approximately $4,100,000, the Escrow Account, valued at approximately $24,100,000, and the proceeds of the above settlements with William and Joyce Rubin valued at approximately $1,200,000. As a result, it is anticipated that approximately $29,400,000 will be available shortly after the hearing described below for allocation under the Sharing Agreement.

NOTICE OF HEARING

A hearing will be held on June 27, 1983, at 11:30 a.m., in the United States Courthouse, 110 South Fourth Street, Minneapolis, MN 55401 for the purpose of determining whether the Sharing Agreement and Settlement Agreements should be approved by the Court as fair, reasonable, and adequate and seeking the transfer of money to the central fund for allocation under the Sharing Agreement as described above.

At the hearing, any Class Member who has not excluded himself from the Class, as set forth above, may appear, through counsel if he chooses, and show cause why the Sharing Agreement and Settlement Agreements should not be approved; provided, however, no person may appear and object unless he has first filed with the Clerk of the Court, United States District Court, District of Minnesota, Fourth Division, 110 South Fourth Street, Minneapolis, MN 55401, a written notice of his intention to appear and object and stating the full legal and factual basis for such objection. Such written notice must be received by the Clerk of the Court on or before June 15, 1983, and accompanied by sworn proof of service stating that such written notice and all supporting papers were served by first class mail, postage prepaid, upon:

Plaintiffs' Steering Committee, 900 Norwest Midland Bldg., Minneapolis, MN 55401.

ADDITIONAL INFORMATION

Any questions you may have concerning the matters contained in this Notice should be directed in writing to Clerk of the Court, United States District Court, District of Minnesota, P.O. Box 9837, Minneapolis, MN 55440.

DATED: May 31, 1983.

Robert E. Hess
Clerk of the Court
United States District Court
District of Minnesota

No. 86-715

Supreme Court, U.S.
FILED
FEB 12 1987
JOSEPH F. SPANIOL, JR.

In The
Supreme Court of the United States

October Term, 1986

IN RE FLIGHT TRANSPORTATION CORPORATION SECURITIES LITIGATION

SUBCLASS IV (UNITHOLDERS),

Petitioners,

vs.

FOX AND COMPANY, REAVIS & MCGRATH, *ET AL*,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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February 12, 1987

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Introduction

This Supplemental Brief is filed by Harris Trust and Savings Bank ("Harris Bank"), a member of Subclass IV, Petitioners herein, pursuant to Supreme Court Rule 22.6.[1] After the named class representatives of Subclass IV filed a Petition for Writ of Certiorari with this Court on October 29, 1986, intervening matters indicate

[1] Supreme Court Rule 22.6 provides in relevant part that any party "... may file a supplemental brief at any time while a petition for writ of certiorari is pending calling attention to new

(Footnote continued on the following page)

that Harris Bank may no longer be adequately represented in this appeal. Accordingly, Harris Bank seeks to advise the Court of its interest in this appeal and inform the Court that it objects to any proposal to voluntarily withdraw or dismiss the pending Petition for Writ of Certiorari heretofore filed by the representatives of Subclass IV.[2]

I. HARRIS BANK, A MEMBER OF SUBCLASS IV, OBJECTS TO ANY VOLUNTARY DISMISSAL OF THESE PROCEEDINGS.

On October 29, 1986, the representatives of Subclass IV filed a Petition for Writ of Certiorari which seeks this Court's review of the adequacy, fairness and reasonableness of certain settlement agreements approved by the United States Court of Appeals for the Eighth Circuit, which impose indemnity and legal defense obligations upon absent plaintiff class members without adequate notice and an opportunity to be heard. The settlement agreements obligate the plaintiff class members to indemnify and hold harmless the settling defendants against any judgment that may be obtained against them arising out of matters which formed the basis of the litigation below. The imposition of unlimited and unascertainable liability

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1 *(Continued)*

cases or legislation or other intervening matter not available at the time of the party's last filing . . ." Harris Bank, a member of Subclass IV, Petitioners herein, is a party to these proceedings and has a significant stake in the outcome of this appeal. *See, e.g., Norman v. McKee*, 431 F.2d 769, 774 (9th Cir. 1970), *cert. denied.*, 401 U.S. 912 (1971).

[2] Throughout this Supplemental Brief, the following abbreviations will be used: (i) "App." refers to the Appendix submitted by the representatives of Subclass IV with the Petition for Writ of Certiorari filed on October 29, 1986; (ii) "R" refers to the record on appeal in the United States Court of Appeals for the Eighth Circuit; (iii) "Tr." refers to the transcript of proceedings before the District Court of Minnesota, or before the United States Court of Appeals for the Eighth Circuit; and (iv) "Pet." refers to the Petition for Writ of Certiorari filed October 29, 1986 by the representatives of Subclass IV.

upon absent class members raises significant issues concerning the due process rights of absent class members which warrant this Court's review.

A. Harris Bank Is A Member Of Subclass IV And Subclass III And Participated In Prior Proceedings Through The Actions Of Its Named Class Representatives.

Harris Bank, a state chartered commercial bank and trust company, with offices in Chicago, Illinois, is a member of Subclass IV and Subclass III in these class action proceedings. Harris Bank is a member of Subclass IV, as Trustee of the Convertible Fund of Trust for the Collective Investment of Employee Benefit Accounts ("Convertible Fund"), which fund holds 1,500 units of Flight Transportation Corporation ("FTC") $ 25,000,000, 11-1/4% Sinking Fund Debentures due June 1, 1995 with warrants ("Debenture Units"). These 1,500 units constitute six (6) percent of the entire issue. Harris Bank is a member of Subclass III, as Trustee of the Special Capital Fund for Collective Investment of Employee Benefit Accounts ("Special Capital Fund") and Trustee of the Common Trust Fund H ("Common Trust Fund"), which funds hold 64,000 shares of FTC common stock comprising approximately ten (10) percent of the 1982 stock offering. Harris Bank does not have a personal, financial interest in the FTC Debenture Units or common stock. Harris Bank's interest is solely as Trustee of the foregoing funds. As a member of Subclass IV and Subclass III, Harris Bank is bound by the terms and conditions of the settlement agreements approved by the United States Court of Appeals for the Eighth Circuit. H. Newberg, *Newberg On Class Actions,* §16.20 (2d Ed. 1985). In the event a claim were made by the settling defendants for indemnification, Harris Bank, in its individual capacity, may be required to indemnify and hold harmless such settling defendants against any judgment which might be obtained, despite the fact that Harris Bank itself has received no benefit from any prior distributions and is effectively unable to obtain reimbursement from those who did receive such benefits.

To date, Harris Bank has not been an active participant in

this litigation and has instead relied upon the representatives of Subclass IV and Subclass III to protect its interests. In the proceedings before the district court, Harris Bank, through its Subclass IV representatives, objected to the settlement agreements which contain provisions obligating the plaintiffs to indemnify the defendants. (Pet. 9). Likewise, after the district court approved the settlement agreements over the objections of the Subclass IV representatives, Harris Bank, through its Subclass IV representatives, appealed to the Court of Appeals for the Eighth Circuit. (App. A1-A2). Finally, when the Court of Appeals approved the settlement agreements over the objections of Subclass IV, and subsequently denied a Petition for Rehearing *en banc,* Harris Bank, through its Subclass IV representatives, filed the pending Petition for Writ of Certiorari in this Court on October 29, 1986. Since the filing of the Petition, however, intervening matters indicate that its Subclass IV representatives may no longer adequately represent Harris Bank's interests and prosecute this appeal.

B. Since The Filing Of The Petition For Writ Of Certiorari On Behalf Of Subclass IV, Intervening Matters Have Occurred Which Indicate The Representatives Of Subclass IV May Attempt To Voluntarily Dismiss The Pending Petition For Writ Of Certiorari.

After the representatives of Subclass IV filed the Petition for Writ of Certiorari in this Court challenging the settlement agreements at issue herein, they entered into another settlement over the objection of Harris Bank. This recent settlement was in the form of an amendment to the initial settlement in these proceedings ("the Sharing Agreement"). The proposed amendment arguably resolves certain disputes concerning final allocations under the Sharing Agreement. One of the terms and conditions of the amendment, however, is that upon "final approval" of the amendment, the Subclass IV representatives shall dismiss the pending Petition for Writ of Certiorari. Harris Bank objected to this provision. A hearing was held before the district court on December 15, 1986 concerning the amendment. Counsel for Harris Bank appeared at such hearing and strenuously objected to the amend-

ment on the grounds that this Court should not be precluded from the opportunity to decide the Petition for Writ of Certiorari on its merits. (Tr., district court: December 15, 1986 at 4). Despite these objections, the district court approved the amendment.[3]

In accordance with the terms of this amendment, the representatives of Subclass IV may seek to voluntarily dismiss the pending Petition for Writ of Certiorari. Harris Bank, however, objects to any voluntary dismissal of the pending Petition for Writ of Certiorari. The Petition for Writ of Certiorari has merit, particularly with respect to the situation of Harris Bank, and this Court should be allowed to act upon it. If the Petition for Writ of Certiorari is withdrawn over its objections, Harris Bank will be improperly precluded from seeking this Court's review of the constitutionality of requiring each innocent member of Subclass IV, without prior notice or hearing, to indemnify the settling defendants against any liability related to the issuance of FTC securities, thereby effectively bearing the defendants' risks. If the Petition for Writ of Certiorari is allowed, then the Supreme Court should not be precluded by interim actions, taken over the objections of Harris Bank, from fully reviewing the prior settlements and issuing an opinion on the merits.

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[3] On January 14, 1987 Harris Bank filed a timely notice of appeal to the United States Court of Appeals for the Eighth Circuit concerning the district court's approval of the amendment to the Sharing Agreement.

C. If The Subclass IV Representatives Voluntarily Dismiss The Pending Petition For Writ Of Certiorari, Harris Bank Will No Longer Be Fairly And Adequately Represented.

If the representatives of Subclass IV are unwilling to proceed with the pending Petition for Writ of Certiorari, Harris Bank should alternatively be granted leave to substitute as petitioner and prosecute the pending Petition for Writ of Certiorari, or be granted leave to file its own Petition for Writ of Certiorari with this Court, or be granted leave to intervene in these proceedings. This Court may conclude, as a matter of law, that Harris Bank's interests are not adequately represented where, as in this case, the class representatives have for the first time indicated their unwillingness to seek further review of an erroneous district court order. *Baker v. Wade,* 769 F.2d 289, 292 (5th Cir. 1985), *cert. denied.*, ___ U.S. ___, 106 S.Ct. 3337, 92 L.Ed.2d 742 (1986); *Burkhalter v. Montgomery Ward and Co.,* 676 F.2d 291, 294 (8th Cir. 1982).

As a practical matter, the apparent unwillingness of Subclass IV's representatives to go forward with this appeal places Harris Bank in a procedural quandary. There is no question that Harris Bank is bound by the terms of the settlement agreements and would be subject to the indemnification provisions contained therein. *Hansberry v. Lee,* 311 U.S. 32, 43 (1940); H. Newberg, *Newberg On Class Actions,* §16.20 (2d Ed. 1985). However, if the representatives of Subclass IV are permitted to voluntarily dismiss this appeal, Harris Bank will have no alternative means of preserving its objections because the ninety day jurisdictional time period within which Harris Bank could have filed its own timely Petition for Writ of Certiorari in this Court has elapsed. *See, e.g.*, S.Ct.R. 12. Certainly the decision to appeal does not rest solely with Harris Bank's named class representatives. *See, e.g., Pettway v. American Cast Iron Pipe Co.,* 576 F.2d 1157, 1177-78 (5th Cir. 1978), *cert. denied.*, 439 U.S. 1115 (1979). Moreover, absent class members do not waive appellate review merely because they failed to take affirmative action when their interests were at one time adequately represented. *In re General Motors Corporation Engine Interchange Litigation,* 594 F.2d 1106, 1121 (7th Cir.),

cert. denied, 444 U.S. 870 (1979). Harris Bank has not sought leave to intervene in any of the prior proceedings or filed its own notice of appeal because in prior proceedings its interests were adequately protected by the representatives of Subclass IV.

If Harris Bank is not alternatively substituted as petitioner, or granted leave to file its own Petition for Writ of Certiorari in these proceedings, or granted leave to intervene to prosecute the pending Petition for Writ of Certiorari, Harris Bank will be seriously prejudiced. As a practical matter, if a claim were ever made for indemnification by any of the settling defendants, Harris Bank would be the real party at risk, even though Harris Bank has received and will receive no personal benefit whatsoever from any of the settlements. In that event, Harris Bank would not be permitted to charge any of the funds for any of the allowed defense or indemnification costs. Rather, Harris Bank's only recourse would be to, in turn, seek indemnification from the hundreds of individual pension and profit sharing plans and trusts to which it paid the distributed amounts in good faith. This would not be realistically feasible. For example, some participating plans have been terminated or have made unrecallable lump sum distributions. Most, if not all, have experienced significant turnover of individual participants since the distribution was made. There have been comparable changes in the trust accounts which participate in the Common Trust Fund. The unknown level of risk to which Harris Bank would be exposed by imposition of the indemnification provisions on an *ex post facto* basis, were those provisions to remain in effect, makes it essential to Harris Bank that the pending Petition for Writ of Certiorari filed by its Subclass IV representatives be reviewed by this Court on the merits.

II. THE PETITION FOR WRIT OF CERTIORARI HAS MERIT AND SHOULD BE GRANTED BY THIS COURT.

A. The Decision Of The Eighth Circuit Conflicts With Decisions Of This Court And Other Circuit Courts Of Appeals.

In essence, the decision of the Eighth Circuit approves the imposition of financial obligations upon absent class members without adequate notice and an opportunity to be heard. This result is in direct conflict with this Court's holding in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), where this Court held that, if a court approves a settlement agreement which binds an absent class plaintiff concerning a claim for money damages, due process of law requires that the absent class member must receive adequate notice and an opportunity to be heard and participate in the litigation. *Id.* at 804.

In this case, the initial class action notice sent to absent class members made no reference, direct or indirect, to the possibility that class members could have any financial obligations imposed upon them should they elect to remain in the class. In fact, the notice expressly stated to the contrary and provided that, "Remaining class members will not subject you to any out-of-pocket costs or fees." (App. H1). The Eighth Circuit's approval of the financial obligations imposed upon the absent class members, who were never served with process and who were without prior notice that such obligations could be imposed, is a drastic deprivation of due process of law which deserves this Court's attention.

Similarly, the Eighth Circuit's approval of the district court's ultimatum that Subclass IV either accept the settlements in question or renounce all prior settlements and go to trial against all remaining defendants is the type of coercion specifically disapproved of by this Court in *Evans v. Jeff D.*, ___ U.S. ___, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986), and other Circuit Courts of Appeals. *See Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1216 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); *In re General Motors Corp. Engine Interchange Lit.*, 594 F.2d 1106, 1124 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979).

The Eighth Circuit reasoned that the district court did not coerce Subclass IV into accepting the settlements because it gave Subclass IV the option of going to trial provided that Subclass IV return the approximately $11,000,000 previously distributed to its members and give up their claims under the Sharing Agreement. (App. A8-A9). This option, however, was only illusory as respects Harris Bank. Refunding was not a viable option because those funds were the product of Court approved settlements with other defendants, and refunding would have required Subclass IV to cancel and thereby breach earlier settlement agreements. Moreover, it was realistically impossible for Harris Bank to reclaim the distribution that it had already in good faith redistributed to the hundreds of holders of the Liquidating Accounts and which had in turn been reallocated to the accounts of thousands of individual participants and beneficiaries.[4]

B. The Decision Below Calls For The Exercise Of This Court's Supervisory Powers.

In the proceedings below, neither the district court nor the United States Court of Appeals for the Eighth Circuit cited any authority in support of the proposition that a federal court has the power to impose financial obligations upon absent class members without prior notice that, if they remain in the class, they may be exposing themselves to liabilities. (App. A1-A9; C1-C7). If the opinion of the Eighth Circuit stands, notices in all future class

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[4] In rendering its opinion, the Eighth Circuit took some comfort in concluding that the possibility that the indemnity provisions would be invoked was at best remote. (App. A5). The record, however, contains no factual information to support this conclusion. To the contrary, counsel for defendant Fox and Company admitted in oral argument before the Eighth Circuit that the indemnities had substantial value to his client, thus implying that the risk of liability was, and is, real. (Tr., United States Court of Appeals for the Eighth Circuit: May 14, 1986 at 38-42). Finally, whether the obligations resulting from the indemnity provisions are remote, or not, is irrelevant. There simply is no authority for the proposition that unlimited financial obligations, remote or otherwise, can be imposed upon absent class members without adequate notice and an opportunity to be heard.

actions will have to disclose clearly to potential class members that, if they do not opt out, they may be placing their own assets in jeopardy, because eventual settlements approved by the court, even over the objection of the class representative, may make the class members unlimited insurers of the defendants' risks. The imposition of unlimited and unascertainable liabilities upon absent class members raises serious questions regarding the viability of the class action device which warrants the exercise of this Court's supervisory powers in these proceedings.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari filed by the representatives of Subclass IV on October 29, 1986 should be granted. In the event that the Subclass IV representatives attempt to voluntarily dismiss the Petition prior to this Court's consideration of the Petition on the merits, Harris Bank should be substituted as petitioner to prosecute the pending Petition for Writ of Certiorari filed on behalf of Subclass IV, or be granted leave of Court to file its own Petition for Writ of Certiorari, or be granted leave to intervene in these proceedings.

Respectfully submitted,

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(3)

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QUESTIONS PRESENTED FOR REVIEW

The questions presented in the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit (the "Petition") are not worthy of review by this Court. The decision of the Court of Appeals for the Eighth Circuit in this case is fully consistent with the decisions of this Court and will have no appreciable impact on class action litigation. Contrary to the assertions in the Petition, no "important questions of federal civil procedure in approving class action settlements" are raised by the Eighth Circuit's opinion. Rather, the case was decided in accordance with this Court's ruling in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and *Evans v. Jeff D.*,___U.S.___, 106 S. Ct. 1531, 89 L.Ed.2d 747 (1986). Consequently, further review is unwarranted.

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STATEMENT OF THE CASE

Respondents Subclasses I, II, III and V and the Receiver substantially concur with Petitioner's statement of the case as far as it goes. However, that Statement does not present the Court with all of the relevant facts.

This case began in 1982 when the Securities and Exchange Commission ("SEC") uncovered a massive fraud in connection with Flight Transportation Corporation ("FTC"), a Minneapolis based air transportation company.

FTC had sold over $30 million dollars in securities in four public offerings in the three years prior to discovery that the company was, essentially, a sham. A Receiver was appointed and numerous private lawsuits followed, including this massive securities fraud litigation.

Under a court approved "Sharing Agreement" in 1983, a class of defrauded FTC securities purchasers (subclassed to account for purchasers of the four FTC offerings and in the open market), the Receiver of FTC, and FTC's defrauded creditors resolved certain differences among themselves and combined their forces to prosecute all of their claims for recovery under the direction of the class Plaintiffs' Steering Committee. With several bumps and detours along the way, recovery of over $50 million in losses was accomplished by a series of interrelated settlements with various defendants, culminating with a group of settlements in late 1985 (the "Settlements"), only two of which are the subject of the Petition.

But for this appeal, the $50 million settlement fund, after costs and fees still to be determined by the district court, would have been distributed to the defrauded securities purchasers and other creditors of FTC sooner than 4 years after the frauds were uncovered. The recoveries represent in excess of 90% of the public losses. Petitioner, Subclass IV, including Harris Trust and Savings Bank ("Harris Trust"), which filed a Supplemental Brief in Support of the Petition ("Supplemental Brief"), has already received $11 million from the settlement fund, or approximately 75% of its losses.

Subclass IV objected to and appealed from the Settlements because of certain indemnification provisions. Two of the Settlements, one with Reavis & McGrath ("Reavis"), FTC's underwriters' counsel, and one with Fox and Company ("Fox"), FTC's auditors, contained indemnifications broader than the usual "judgment reduction" indemnification. The indemnification contained in

the Reavis Settlement is limited to the amount Reavis has contributed to the settlement fund, but is not limited to claims-over of non-settling defendants. The indemnification contained in the Fox Settlement is not limited in amount or to claims-over.

The Settlements and the indemnifications were not entered into or approved in a vacuum, as the Petition and the Supplemental Brief would have it, but were the result of extremely thorough and careful investigations. This case, now almost five years old, has been thoroughly aired from every conceivable angle. First, by the SEC which closed down the fraudulent FTC operation and secured appointment of a Receiver in 1982. Then by class counsel who, with the assistance of the Receiver, prosecuted the civil actions against FTC, its officers, directors, D & O liability carrier, attorneys, attorneys' insurers, accountants, underwriters, underwriters' attorneys, aircraft hull insurance carrier and major lenders. The Receiver, who was also the debtor-in-possession, vigorously explored virtually every nook and cranny of FTC's operations, legitimate and illegitimate, and tracked down all claims and assets of FTC, both inside and outside of the United States. The United States Attorney in Minnesota prosecuted criminal actions against FTC's president, chief financial officer, head accountant, and primary outside attorney, all of whom are now in prison. Further, some of FTC's outside directors and others prosecuted their own actions against FTC, its principals, and banks which honored forged checks. Finally, the Settlements, like all of the settlements herein, were closely supervised by the district court and provided that the settling defendants assign to the plaintiffs all claims, known or unknown, which the settling defendants possessed or might possess relating to FTC, except for a few small claims which were carved out of the indemnification provisions.

Thus, when the Settlements were approved, the plaintiffs and their counsel, as well as the district court, were

well aware of the universe of potential claims which might give rise to actions under the indemnifications. Indeed, they "controlled" almost all of those potential claims. Both plaintiffs' counsel and the FTC Receiver determined the risk of the indemnifications to be de minimus and worth taking in light of the approximately $15 million added to the settlement fund by the Settlements (over $7 million by the two which are the subject of the Petition) and the fact that Fox was the last major defendant in the case. The district court and circuit court agreed from both a factual and legal standpoint and found the risks of the indemnifications "remote."

Following the Eighth Circuit's decision upholding the Settlements, counsel for the class, the Receiver, and counsel for Subclass IV continued negotiations to resolve the issues in the Petition. In November of 1986, an agreement was reached (the "Agreement," set forth in the Appendix at 1a ("App. at ___ ")). The Agreement was approved by the district court after notice to all concerned parties and a hearing on December 16, 1986. App. at 14a.

The Agreement leaves the challenged indemnifications intact, reduces the amount of the settlement fund to be distributed to Subclass IV by $500,000 which would remain in the settlement fund as that subclass's contribution to class plaintiffs' attorneys' fees as and when approved by the district court, sets guidelines for applications for counsel fees, provides for prompt distribution to all subclasses of their shares of the recoveries, and provides for withdrawal of the Petition following final approval of the Agreement. Two extensions of time on the briefing of the Petition were sought and granted to allow the Agreement to become effective and the Petition to be withdrawn.

Harris Trust, however, objected to the Agreement, solely because of its contemplated withdrawal of the Petition. On January 14, 1987, Harris Trust filed a Notice of Appeal to the Eighth Circuit. App. at 16a. On February

12, 1987, Harris Trust filed the Supplemental Brief.

With respect to Subclass IV's "due process" notice argument, respondents note that Subclass IV never challenged the sufficiency of the May 31, 1983, class certification notice below. Nor did it challenge the sufficiency of the notices of the Reavis and Fox Settlements, which are not even discussed in the Petition or Supplemental Brief. No wonder: both of those notices specifically advised class members of the indemnification provisions.

The Reavis Settlement notice stated:

> 3. Reavis & McGrath, its partners, associates and agents, past and present, will be indemnified with respect to judgments against them by parties to this action subject to the terms and conditions more fully set forth in the Settlement Agreement.

App. at 19a.

The Fox Settlement notice stated:

> 3. Fox, its partners, employees and agents, past, present, and future, will be indemnified with respect to claims against them by any person arising out of or relating to any transaction or occurrence involving FTC and Fox as more fully set forth in the Settlement Agreement.

App. at 23a.

Both notices set forth the date and time of the hearing for final approval of the proposed Settlements and advised class members of their right to appear and show cause why the Settlements should not be approved. The district court also allowed objecting class members to opt out of the class if they so chose.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The decision of the Eighth Circuit involves no conflict with any decision of this Court. The decision to approve the Settlements, which end massive and complex securities fraud litigation and enable defrauded claimants to recover almost unprecedented percentages of their losses, is clearly correct. The issues before this Court have been fully considered by the district court and the Eighth Circuit. Further review is unwarranted.

SUMMARY

The district court, in approving the Settlements, found them to be "fair, reasonable and adequate". In discussing the portions of the Settlements requiring plaintiffs to defend and indemnify the settling defendants, the district court found that in light of all that is known about this case the probability that the provisions would be invoked was "remote". The Eighth Circuit affirmed the district court's decision, concluding that the district court's "finding that the risk to which the indemnity provisions expose Subclass IV . . . is tolerable, is not clearly erroneous, and we therefore accept it." The controversy between Petitioner and Respondents has subsequently been resolved. Harris Trust, which filed the Supplemental Brief, seeks only delay.

I. This Controversy Has Been Effectively Resolved

As stated in Petitioner's Supplemental Reply Brief to the Supplemental Brief of Harris Trust and Savings Bank and as demonstrated in the Agreement, App. at 1a, the substance of the dispute which gave rise to the appeal below and this Petition has been resolved. No real dispute between Petitioners and Respondents is presented to this Court. Only Harris Trust continues to support the Petition and informally requests leave to intervene in the Petition, take over the Petition, or submit a substitute Petition.

Only Harris Trust desires to keep this controversy alive. All other members of the Class, including Subclass IV (which consists of 52 other institutional investors), want this dispute to end now on the terms of the Agreement so that distribution of recoveries can begin.

Harris Trust's true fear is set forth on page 3 of its Supplemental Brief. It states that even though it "does not have a personal, financial interest in the FTC" settlement fund, but is "interest[ed] solely as Trustee of" several trusts which purchased FTC securities, it "may be required to indemnify" Fox or Reavis although it "received no benefit" and may be "unable to obtain reimbursement from" its trust beneficiaries. In short, Harris Trust fears the potential risk (which two reviewing courts have characterized as "remote") to which it voluntarily subjected itself by acting as a nominee class member for the trusts it manages.

Due to those fears, Harris Trust now seeks to delay the conclusion of this case and the distribution of the class recovery. By supporting the Petition and pursuing an identical appeal in the Eighth Circuit,[1] Harris Trust presumably intends for its delaying tactics to last until all statutes of limitation have run or until the Agreement is terminated by virtue of a self-destruct provision which requires final approval by April 30, 1987. App. at 30a. Harris Trust hopes that it will not have to distribute any additional recoveries to the trusts on whose behalf it is acting until all unknown claims have expired.

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[1] Harris Trust's Eighth Circuit Appellant's Form A, noting the issues for appeal, was filed on February 11, 1987, the day before its Supplemental Brief. App. at 25a. Harris Trust filed its motion to stay its appeal to the Eighth Circuit on March 16, 1987. App. at 27a. An order denying that motion was entered on March 19, 1987. App. at 29a. Respondents here, appellees in Harris Trust's Eighth Circuit appeal, have moved to dismiss that appeal as frivolous, already decided under the law of the case doctrine, and as subsumed in the relief Harris Trust seeks here.

This Court should dismiss this Petition promptly, as lacking true controversy and unworthy of a writ of certiorari. This Court should permit this lengthy securities fraud litigation to end and the defrauded claimants to recover their funds. Despite Harris Trust's fears, no significant issue is raised.

II. Even If This Controversy Had Not Already Been Resolved, The Petition Should Be Denied

A. The Opinion Of The Eighth Circuit Is Consistent With The Opinions Of This Court

The courts below, in approving the Settlements with Reavis and Fox, did not coerce any class member to accept the Settlements or deny any class member due process. The Petition's argument is two-fold. First, it raises a new argument that Subclass IV was denied due process because the May 31, 1983, notice of class certification (entered early in the case) did not advise that future settlements with various defendants could contain indemnity provisions.[2] Second, the Petition argues that the "settle or try the case" choice which Subclass IV faced below, as proposed by the district court, was no option at all, but rather a "coercive tactic" designed to force Subclass IV to accept the Settlements. Neither of these arguments is tenable.

Contrary to the Petition's claim, the courts below did not disregard this Court's holding in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), in approving the Settlements. In point of fact, the district court adhered strictly to the due process requirements of *Shutts*.

In *Shutts*, this Court addressed whether a state court

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[2] Subclass IV did not raise the notice argument below, but merely argued that *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), prevented approval of indemnifications like those in the Fox and Reavis Settlements.

could exercise jurisdiction over out-of-state, absent class members who, but for the class action device, would not fall within the court's jurisdiction. This Court held that, since the "downside" risks of counterclaims, cross-claims, fee and cost liabilities, or damages on an adverse judgment, "almost never" or "typically" do not occur, 472 U.S. at 810, then, as long as due process protections are satisfied, a state court may exercise jurisdiction over absent class members not otherwise amenable to that court's power. *Id.* at 811. Due process protections require only that absent class members be afforded: 1) notice of the action, 2) an opportunity to appear, 3) an opportunity to opt out, and 4) adequate representation. *Id.* at 812.

Here, a major concern of *Shutts* is lacking entirely. There is no question that the federal district court has jurisdiction over all of the absent class members even without the class action device. The case arises under the federal securities laws, where nationwide jurisdiction exists. *See* 15 U.S.C. §§77v, 78aa; *Haas v. Wieboldt Stores, Inc.*, 725 F.2d 71, 73 (7th Cir. 1984). The federal court is clearly the proper forum and its rulings are binding upon all class members without ever raising the central jurisdictional issue which concerned this Court in *Shutts*.

Nor can Subclass IV claim under *Shutts* that it was entitled to any different notice than it received. The Petition raises for the first time the claim that the 1983 notice of class certification was defective because it did not inform the class that future settlements with the defendants could contain indemnification provisions. By failing to raise this issue with the district court or the Eighth Circuit, however, Subclass IV waived its right to pursue this claim before this Court. *See e.g., Strahan v. Pedroni*, 387 F.2d 730, 732 (5th Cir. 1967). Further, even if not waived, this argument lacks merit. Failure of the class certification notice to advise class members of the remote possibility that future settlement agreements might contain unusual indemnity provisions did not prejudice Subclass IV or any other class

member.

First, the notices of Settlement sent to all class members specifically regarding the Fox and Reavis Settlements alerted the class to the indemnification provisions as well as the other terms of the Settlements and the date set for hearing on the Settlements. The notices specifically provided that any class member objecting to the Settlements could appear at the hearing and show cause why the Settlements should not be approved. Indeed, counsel for Subclass IV appeared, sought the benefits of the Settlements, sought to retain all the benefits of the prior related settlements, but objected to the indemnification provisions.

Second, the district court, after entertaining Subclass IV's objections in full, analyzed the indemnifications in detail, concluded that the objections were without merit and approved the Settlements. However, even as it did this, the district court gave Subclass IV and other objectors present the opportunity to opt out of the class and proceed to trial. Thus, in addition to subjecting the indemnification provisions to careful analysis, the district court provided Subclass IV with every due process protection mandated by *Shutts*: notice, the opportunity to appear, the opportunity to opt out and adequate representation. The Eighth Circuit similarly analyzed the indemnifications and the procedures leading to their approval, as well as the objections, and affirmed the district court.[3]

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[3] The Petition claims that the Eighth Circuit's decision will have a substantial adverse impact upon class actions because the initial notice of class certification in future class actions would have to "disclose clearly to potential class members that if they do not opt out they may be placing their own assets in jeopardy". Petition at 15-16. This is unnecessary. The use of other than judgment reduction indemnity provisions is not common. Moreover, the class representatives would never

(Footnote continued on the following page)

The choice the district court presented to Subclass IV of accepting the Settlements or proceeding to trial did not impose "onerous and coercive conditions" upon it. Denial of that choice might have been coercive. However, instead of requiring Subclass IV to be bound by all of the Settlements despite its objections, the court reminded Subclass IV that it could opt out of the class and not be bound at all. That this would require Subclass IV to return disbursements to which it was not entitle if it was not a member of the class is not coercive, it is a matter of equity and common sense.

Reliance upon *Evans v. Jeff D.*, ___ U.S. ___ 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986), to establish that the district court acted coercively is also misplaced. The Eighth Circuit's approval of the Settlements in no way conflicts with *Evans*. The passage quoted by Subclass IV demonstrates this: "the power to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed." 89 L.Ed.2d at 757. The district court explicitly did not require Subclass IV to accept the Settlements, but afforded it the opportunity to opt out of the class so that it would not be forced to enter into settlements with which it did not agree. This is entirely in keeping with *Evans*. Indeed, in submissions to the district court Subclass IV and the other objectors specifically requested the opportunity to opt out rather than accept the indemnifications.[4]

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3 *(Continued)*

agree to such a provision nor would a district court approve such a provision, unless the likelihood that it would be triggered is minimal. Where an indemnification provision is negotiated as part of a settlement, notice to the class members of the indemnification via the notice of settlement coupled with the opportunity to be heard, adequate representation and the opportunity to opt out is sufficient.

[4] The Petition's reliance upon *United States v. Swift*, 286 U.S.

(Footnote continued on the following page)

Neither *Shutts* nor *Evans* supports the contention that the lower courts acted coercively or in excess of their powers. As there is no departure from established precedent warranting this Court's review, the Petition should be denied.

B. The Risks Presented By The Indemnification Provisions Are Remote

The history of this case demonstrates that the risks presented by the indemnification provisions are truly minimal. In October 1985, the district court, fully familiar with the facts of this case, carefully evaluated these risks and concluded they were "remote". Thereafter, the Eighth Circuit examined the issue and agreed with the district court's analysis that the risk to the class members presented by the indemnification provisions "is tolerable, is not clearly erroneous."

Since the district court's approval of the Settlements in October, 1985, some 18 months have passed. Not one case has been filed in that time period. Neither Petitioner nor Harris Trust has yet identified any real or hypothetical claim which could activate the indemnification provisions. Indeed, the last complaint arising from the FTC debacle was the class complaint against Alexander & Alexander, filed in December, 1984, by the Plaintiffs Steering Committee. Moreover, all of the settling defen-

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4 *(Continued)*

106 (1931), is puzzling. In *Swift*, defendants sought modification of a consent decree restraining trade which they had voluntarily entered into several years earlier. This Court held that modification of the decree was improper as there was no showing of a "grievous wrong evoked by new and unforeseen conditions" so as to justify modification. *Id.* at 119-20. The decision at bar is not even remotely in conflict with *Swift*. The issue here is not whether a consent decree should be modified. Rather it is whether the indemnifications in the settlements were proper and whether petitioner was afforded due process.

dants have assigned their claims to the class plaintiffs or have carved them out of the indemnification provisions. Thus, the filing of any additional, unknown claims is, as the lower courts recognized, simply too remote and conjectural to impair the propriety of the Settlements' approval.

This is a case where the class members will receive an almost unprecedented recovery. The benefits accruing from settlements where class members are likely to recover more than 90 cents on the dollar far outweigh the nonexistent risk that an indemnification provision could be invoked. Put simply, acceptance of the minute risk inherent in the indemnification provisions in this case was necessary in order to achieve such a substantial recovery.

APPENDIX

INDEX TO APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

IN RE: FLIGHT TRANSPORTATION CORPORATION SECURITIES LITIGATION	Master Docket No. 4-82-874 M.D.L. No. 517 Honorable Charles R. Weiner

AMENDMENT TO THE SHARING AGREEMENT CONCERNING SUBCLASS IV BY AND AMONG THE CLAIMANTS

This Amendment to the Sharing Agreement ("Amendment") is entered into on the date set forth below, by and among the parties thereto, being the five Subclasses, through their attorneys; certain Participating Creditors, through their attorneys; and the Receiver. This document amends the Sharing Agreement dated April 15, 1983 (previously approved by order of the Court) by and among the parties hereto only to the extent set forth herein and the parties hereto reconfirm all other terms of the Sharing Agreement.

WHEREAS, the parties hereto entered into the Sharing Agreement in order to provide, among other matters, for allocation of Total Recoveries and for the common prosecution of all claims of the various Claimants;

WHEREAS, the Plaintiff Steering Committee has prosecuted such claims and added in excess of $20,000,000 to the Total Recoveries over the amount originally in the Escrow Fund;

WHEREAS Subclass IV has objected to indemnity provisions in certain settlement agreements, such objections were overruled by the District Court, said ruling

was upheld by the United States Court of Appeals for the Eighth Circuit, and Subclass IV has petitioned the United States Supreme Court for a Writ of Certiorari;

WHEREAS, subject to the conditions set forth herein, Subclass IV is willing to agree to a reduction of $500,000 in the amount of its remaining Allocation under the Sharing Agreement in order to expedite the payment of amounts due to the Subclass thereunder, to provide for payment of attorneys fees and expenses to the representatives of Subclass IV and to recognize the contribution of the Plaintiff Steering Committee;

WHEREAS, the other Subclasses, the Participating Creditors and the Receiver are willing to expedite the allocation of such funds and payment of interest thereon from Total Recoveries, subject to the terms and conditions set forth herein;

WHEREAS, the parties hereto are willing to agree as to the source for payment of attorneys fees for counsel for the various Subclasses;

WHEREAS, the parties hereto wish to avoid incurring additional attorneys fees, expenses and delays regarding such matters;

WHEREAS, by Pretrial Orders ____, 272, and 273, the Court has approved Principal Allowed Claims for members of Subclass IV totalling $14,597,458;

WHEREAS, pursuant to Pretrial Orders dated July 19, 1984 and January 21, 1985, the Court approved a first Allocation of $11,000,000 from the Escrow Fund to Subclass IV and distribution of that Allocation to members of Subclass IV; and

WHEREAS, pursuant to paragraph 0 of the Sharing Agreement, Subclass IV is entitled to an additional Allocation of $2,867,585 in order to bring amounts allocated to Subclass IV to the 95% of Principal Allowed Claims, as provided for in the Sharing Agreement (the

"Additional Allocation").

THEREFORE, IT IS AGREED AMONG THE PARTIES HERETO:

1. Subject to all of the provisions hereof, Subclass IV agrees to reduce its claim for the Additional Allocation by $500,000 to the principal amount of $2,367,585. In addition to the principal amount of $2,367,585 such Allocation shall include a pro-rata share of interest earned on funds held by the Receiver from the date of this Amendment including interest on the allocation provided for in paragraph 5 below (this Allocation including interest shall be referred to as the "Modified Allocation"). The Modified Allocation shall be made to Subclass IV not later than five days after the latter of: (a) the date of Final Approval (as hereinafter defined) of this Amendment; or (b) dismissal of the Petition for Writ of Certiorari.

2. If the Court shall award attorneys fees and disbursements to counsel for the other Subclasses less then $3,000,000, then a proportionate amount of the $500,000 referred to above shall be reallocated to Subclass IV.

3. Counsel for Subclass IV, upon Final Approval shall request dismissal with prejudice of its Petition for Writ of Certiorari to the United States Supreme Court.

4. Attorneys fees and expenses for Best & Flanagan, Ropes & Gray, and Cole & Dietz, (counsel for the representatives of Subclass IV as designated in paragraph B(1) of the Sharing Agreement), shall be paid, as allowed by the Court, out of the Modified Allocation. All parties to this Amendment agree that the attorneys' fees and expenses heretofore requested in petitions filed by these law firms are reasonable in nature and amount, that they will recommend that such petitions be allowed as submitted, and that they shall not oppose any such petitions. No other attorneys fees or expenses, of any kind, shall be charged to or paid out of the Modified Allocation of Subclass IV.

5. If the Agreement attached hereto as Exhibit A

shall receive final approval by the Court, Liberty Service shall become member of Subclass IV with a Principal Allowed Claim in the amount of $490,000 and shall be treated in the same manner as other members of the Subclass IV provided that an additional Allocation of $465,500, shall be added to the Modified Allocation not later than five days after the date of Final Approval. Such actions shall permit Liberty Service to participate as a member of Subclass IV without discrimination of the rights of other members of Subclass IV.

6. Immediately upon execution of this Amendment, the parties hereto shall jointly apply to the District Court for preliminary approval thereof, and, in connection with said application, to submit the proposed order attached hereto as Exhibit B. In the event such order is not entered by November 30, 1986, this Amendment shall be null, void and of no further force or affect. In the event that this Amendment does not receive Final approval by the District Court as fair, reasonable and adequate, after hearing on notice to members of Subclass IV, on or before February 28, 1987, this Amendment shall be null, void and of no further force or effect. "Final Approval" of the this Amendment shall mean the thirty-first (31) day after the entry of an order by the District Court approving all of the terms and conditions of this Amendment if no appeal is taken therefrom and, if an appeal is taken therefrom, the first day after resolution of said appeal when no further appeals or petitions for certiorari or other appellate proceedings may be filed.

7. The Modified Allocation, after payment or reservation of sums required to pay attorneys' fees and expenses as set forth in Section 4 hereof, shall be distributed to members of Subclass IV within thirty (30) days of Final Approval, subject to such assurance, if any, that Subclass IV representatives may require for an effective sharing of the Subclass' exposure under the indemnity provisions which are the subject of the Petition for Writ of Certiorari

described above.

AGREED AND STIPULATED THIS 14th DAY OF NOVEMBER, 1986.

SUBCLASSES I, II, III, and V:
(Plaintiffs Steering Committee)

By: /S/ JACK L. CHESTNUT
JACK L. CHESTNUT

By: /S/ JOHN A. COCHRANE
JOHN A. COCHRANE

By: /S/ LOWELL E. SACHNOFF
LOWELL E. SACHNOFF

By: /S/ THOMAS P. GALLAGHER
THOMAS P. GALLAGHER

By: /S/ DANIEL W. KRASNER
DANIEL W. KRASNER

On behalf of the parties represented by them in the CONSOLIDATED ACTION

RECEIVER:

By: _____
THOMAS C. BARTSH

PARTICIPATING CREDITORS:

By: /S/ EDWARD J. CALLAHAN
EDWARD J. CALLAHAN
Counsel for Greyhound Leasing and Financing Corporation

By: /S/ JAMES R. SAFLEY
JAMES R. SAFLEY
HOWARD A. PATRICK

SUBCLASS IV:

By: /S/ JAMES C. DIRACLES
James C. Diracles
Counsel for Subclass IV

By: /S/ WILLIAM F. MCCARTHY
William F. McCarthy
On behalf of Putnam High Yield Trust

COLE & DIETZ

By: /S/ ALBERT D. JORDAN
Albert D. Jordan
On behalf of United High Income Fund, Inc., and
Oppenheimer High Yield Fund

EXHIBIT A

UNITED STATES DISTRICT
DISTRICT OF MINNESOTA
FOURTH DIVISION

IN RE: FLIGHT TRANSPORTATION CORPORATION SECURITIES LITIGATION	Master Docket No. 4-82-874 M.D.L. No. 517 Honorable Charles R. Weiner

STIPULATION AND ORDER

WHEREAS, Liberty Service Corporation ("Liberty") purchased $900,000 face amount of Flight Transportation Corporation 11-1/4% sinking fund debentures from the original purchasers thereof on February 11, 1983, along with an assignment of all claims of the original purchasers against Flight Transportation Corporation ("FTC"); and

WHEREAS, CSL Realty Advisers, Inc. ("CSL") acquired those debentures from Liberty on or about November 1, 1984, and is the present owner thereof; and

WHEREAS, Manufacturers Hanover Trust Company, as indenture trustee (the "Indenture Trustee"), has filed a proof of claim on behalf of all holders of such debentures in the bankruptcy proceedings of FTC, and such claim has been reduced to the amount of $990,000, based largely on the debentures owned by CSL; and

WHEREAS, the Indenture Trustee has filed an appeal from the Bankruptcy Court's approval of the Plan of Reorganization of FTC on the ground that such Plan does not properly provide for the claims of the debenture holders according to law; and

WHEREAS, Thomas C. Bartsh, Receiver/Debtor in Possession (the "Receiver"), has filed a motion to have

all claims of Liberty classified in Subclass IV in this litigation and therefore disqualified from allowance in the bankruptcy proceedings and from participation in any distribution from the bankruptcy estate other than as a member of Subclass IV and by virtue of the allocation to Subclass IV under the Sharing Agreement approved by the Court on July 15, 1983; and

WHEREAS, in March 1986, Liberty sent to Subclass IV plaintiffs' counsel for filing a proof of claim in the asserted amount of $900,000; and

WHEREAS, such proof of claim was not filed within the time allowed for filing Subclass IV proofs of claim in these actions, but Liberty contends that it did not have timely notice of the requirement to file such a claim, that its failure to file such claim timely was a result of excusable neglect, and that justice requires the allowance of its claim; and

WHEREAS, the parties hereto have concluded that litigation of the issues posed by these facts would be time-consuming and expensive and would unduly delay the course of these actions and the bankruptcy proceedings, and that the outcome of such litigation is in doubt; and

WHEREAS, the Receiver and certain other parties expect to enter into an agreement, subject to Court approval, settling various controversies regarding Subclass IV claims, which agreement will be premised upon the resolution of the issues covered by this Stipulation and Order as provided herein;

NOW, THEREFORE, the parties hereto, subject to the approval of the Court, agree as follows:

1. The Motion of the Receiver for an order determining that Liberty is a member of Subclass IV shall be granted.

2. Liberty's failure to file its claim as a member of Subclass IV on a timely basis was the result of excusable

neglect which should be excused in the interest of justice, and Liberty's Subclass IV claim shall be allowed in the amount of $490,000, as set forth on the Proof of Claim attached hereto, in full satisfaction of all claims of Liberty and CSL against FTC, the Receiver, and the Escrow Fund.

3. Liberty and CSL will direct Manufacturer's Hanover Trust Company to deliver the $900,000 face amount of debentures to the Receiver for cancellation.

4. This Stipulation and Order is contingent upon and shall be entered only upon the District Court's tentative approval on or before November 30, 1986, of the above-mentioned agreement relating to Subclass IV claims for submission to class members.

BEST AV

ON BEHALF OF
CLAIMANTS' COMMITTEE:

RECEIVER:

/S/ THOMAS BARTSH
By:_____
Thomas Bartsh

PLAINTIFFS' STEERING
COMMITTEE

By:_____

ROBINS, ZELLE, LARSON
& KAPLAN

By:_____

GRAY, PLANT, MOOTY,
MOOTY & BENNETT

By:_____

BEST & FLANAGAN and
ROPE & GRAY

By:_____
James Diracles

ON BEHALF OF LIBERTY SERV
CORPORATION and CSL REALT
ADVISORS, INC.:

HANGLEY CONNOLLY EPSTEI
CHICCO FOXMAN & EWING

By:_____
Mark A. Aroachick
William H. Ewing

Approved and so ordered
this ____ day of ____, 1986:

_____
Charles R. Weiner, J.

AILABLE COPY

EXHIBIT B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

IN RE: FLIGHT TRANSPORTATION CORPORATION SECURITIES LITIGATION	Master File No. 4-82-874 M.D.L. No. 517

PRETRIAL ORDER NO.

WHEREAS, the Court has been advised of an Amendment to the Sharing Agreement ("Amendment") entered into by certain Claimants and the Receiver, as defined in the Sharing Agreement; and

WHEREAS, the Amendment has been executed by counsel for the above named parties and lodged with the Court;

The Court, having duly considered the Amendment, hereby preliminarily approves the terms of such Amendment and Orders as follows:

1. A hearing shall be held before the undersigned at ____ a.m. on ___, 1986, in the United States Courthouse, 110 South Fourth Street, Minneapolis, Minnesota 55401, pursuant to Rule 23 of the Federal Rules of Civil Procedure, for the purpose of determining whether the proposed Amendment to the Sharing Agreement is fair, reasonable and adequate and should be approved by the Court.

2. Counsel for representatives of Subclass IV (Best & Flanagan, Ropes & Gray and Cole & Dietz), as designated in paragraph B(2) of the Sharing Agreement, have heretofore submitted petitions for the payment of fees and expenses. On or before _____, 1986 such counsel shall submit to the Court additional petitions, if

any, for attorney's fees and expenses subsequent to the period served by such prior petitions. At the hearing to be held pursuant to the preceding paragraph hereof, the Court will also consider allowance of such petitions for payment of attorney's fees and expenses, which shall be paid out of the Modified Allocation in the event that the Amendment is approved.

3. Pursuant to Rule 23(e), Fed. R. Civ. P., counsel for Subclass IV shall give notice to each member of Subclass IV of such hearing, the proposed Amendment of the Sharing Agreement, and the approximate amount of the total application for attorneys fees and expenses sought to be paid out of the Modified Allocation. Such notice, in the form to be approved by the Court, shall be sent by first class mail in a postage prepaid envelope addressed to each subclass member at the address shown on their respective proofs of claim.

4. Any member of the Subclass who objects to the approval of the proposed Amendment may appear at the hearing and show cause, if any he has, why it should not be approved as fair, reasonable and adequate. However, any objection must initially be made in writing and filed with the Court, postmarked no later than _____, 1986, showing thereon delivery of a copy of such written objection to Best & Flanagan, 3500 IDS Center, Minneapolis, Minnesota 55402, attorneys for Subclass IV, and Jack L. Chestnut, Chestnut & Brooks, P.A., 900 Norwest Midland Bank Building, Minneapolis, Minnesota 55401, Chairman of the Plaintiffs Steering Committee.

5. No member of the Subclass shall be entitled in any way to contest the approval of the terms and conditions of the proposed Amendment unless he has served and filed written objections in accordance with paragraph 5 above, and any member of the Subclass who fails to object in the manner prescribed shall be deemed to have waived, and shall be foreclosed forever from raising, any such objections

except upon permission of the Court for good cause shown.

6. Notice given in accordance with paragraph 4 above shall constitute due and sufficient notice to all persons entitled thereto under Rule 23(c)(2) of the Federal Rules of Civil Procedure and is determined to be the best notice practicable under the circumstances.

The Honorable Charles R. Weiner
United States District Judge

Dated: November ____, 1986.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

IN RE:
FLIGHT TRANSPORTATION
CORPORATION SECURITIES
LITIGATION

Master Docket
No. 4-82-874
M.D.L. 517

PRETRIAL ORDER NO. 280

ORDER AND JUGDMENT APPROVING AN AMENDMENT TO THE SHARING AGREEMENT CONCERNING SUBCLASS IV BY AND AMONG THE CLAIMANTS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 23 AND 54 (b)

The terms used herein shall have the same meanings as set forth in the Sharing Agreement dated April 15, 1983. Pursuant to Pretrial Order No. 275, and Amendment to the Sharing Agreement Concerning Subclass IV by and among the Claimants (the "Amendment") was preliminarily approved by the Court and notice summarizing the terms of the Amendment was mailed to each member of Subclass IV.

Upon thorough consideration of the Amendment, all documents submitted in support thereof, and having given due consideration to the objection of Harris Trust to the Amendment, the Court finds that the Amendment to the Sharing Agreement is fair, adequate and reasonable.

FILED 12-19-86

JUDGMENT ENTERED _____

THEREFORE, IT IS ORDERED THAT:

(1) The Sharing Agreement dated April 15, 1983 is hereby modified to the extent set forth in the Amendment;

(2) The Receiver is authorized to enter into the Amendment and effectuate its terms including the allocations as provided for in paragraphs 1 and 5 thereof; and

(3) The Court finds that there is no just reason for delay and directs that judgment be entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

LET JUDGMENT BE ENTERED ACCORDINGLY.

The Honorable Charles R. Weiner
United States District Judge

Dated: December 15, 1986.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

IN RE: FLIGHT TRANSPORTATION CORPORATION SECURITIES LITIGATION	Master Docket No. 4-82-874 M.D.L. 517

NOTICE OF APPEAL

Harris Trust and Savings Bank, as Trustee of the Convertible Fund of Trust for Collective Investment of Employee Benefit Accounts, and as a member of Subclass IV, by its attorneys, appeals to the United States Court of Appeals for the Eighth Circuit from the Order and Judgment Approving an Amendment to the Sharing Agreement Concerning Subclass IV dated December 15, 1986, and filed on December 19, 1986.

DOHERTY, RUMBLE & BUTLER
PROFESSIONAL ASSOCIATION

By_____
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Attorneys for Harris Trust and Savings Bank

FILED Jan 14 1987

JUDGMENT ENTERED 12-19-86

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

IN RE: FLIGHT TRANSPORTATION CORPORATION SECURITIES LITIGATION	Master Docket No. 4-82-874 M.D.L. No. 517 Honorable Charles R. Weiner

NOTICE OF HEARING ON PARTIAL SETTLEMENT

TO: All MEMBERS OF THE CLASS

You were previously notified of the pendency of this litigation on or about May 31, 1983, and also of partial settlements with certain defendants, most recently Drexel Burnham Lambert Incorporated and Moseley, Hallgarten, Estabrook & Weeden Inc. on or about May 31, 1984. The purpose of this notice is to inform you that a partial settlement has been agreed upon by the Claimants' Committee and with an additional defendant, subject to the approval of this Court, which would conclude this litigation as to that defendant. A hearing will be held before this Court to determine whether or not the proposed partial settlement will be approved.

As you were previously informed, this litigation involves claims under the federal securities laws and other statutes and under the common law against Flight Transportation Corporation ("FTC") and other defendants arising out of the offer and sale of FTC securities during the period November 30, 1979, through June 18, 1982. The Court has made no determination with respect to the merits of any of the claims or defenses in this litigation.

Agreement has been reached on a proposed partial settlement of this litigation between counsel for the Claimants' Committee and counsel for defendant Reavis &

McGrath, a law firm which was counsel to the underwriters for the three public securities offerings of FTC in March 1981 and June 1982. Reavis & McGrath specifically disclaims any liability relating to any of the matters alleged in this litigation and expressly denies that it has engaged in any wrongful activity or violated any law or regulation or that any person has suffered any harm or damage as a result of the matters alleged as to it.

The terms and conditions of the proposed partial settlement are set forth in a Settlement Agreement, dated January 14, 1985, a copy of which is on file with the Clerk of this Court. There follows a brief summary of the terms and conditions of the Settlement Agreement, which is subject to the approval of the Court:

1. Reavis & McGrath has placed in escrow the sum of $1,600,000 which sum has been placed in an interest-bearing account pending final approval of the proposed settlement. Provided that this proposed settlement is approved (a) the $1,600,000 plus all accrued interest thereon will be contributed to a central fund for payment of claims of Class members and creditors of FTC, in accordance with the Sharing Agreement entered into by the members of the Plaintiff Class and Plaintiff Subclasses, the receiver of FTC and certain general creditors of FTC approved by the Court in July, 1983, as modified by the Eighth Circuit; and (b) all claims which have been or could have been asserted in this litigation against Reavis & McGrath will be dismissed on the merits and with prejudice. Upon the Court's approval of the proposed settlement, and when such approval shall become final as defined in the Settlement Agreement dated January 14, 1985, on file with the Court, Reavis & McGrath, its partners, associates and agents, past and present, shall without further act by any person be released from, and each and every member of the Class shall be permanently barred and enjoined from instituting or prosecuting, any claim, demand, right or cause of action arising out of or relating to any of the acts, omissions or

other matters that were asserted or could have been asserted against Reavis & McGrath in this litigation or in any other litigation arising out of or relating to FTC.

2. The litigation will continue against the non-settling defendants herein.

3. Reavis & McGrath, its partners, associates and agents, past and present, will be indemnified with respect to judgments against them by parties to this action subject to the terms and conditions more fully set forth in the Settlement Agreement.

4. If this proposed settlement is not finally approved by the Court, the funds held in escrow pursuant to the Settlement Agreement will be returned to Reavis & McGrath and the litigation will proceed as if no settlement has been proposed.

A hearing shall be held before the Court at 11:00 a.m. C.D.T. on _____, 1985, in the United States Courthouse, Courtroom No. 2, 110 South Fourth Street, Minneapolis, Minnesota 55401, for the purpose of determining whether the proposed settlement is fair, reasonable and adequate and should be approved by the Court.

Any member of the Class who objects to the approval of the proposed settlement may appear at the hearing and show cause, if any he has, why the proposed settlement should not be approved as fair, reasonable and adequate and why a judgment should not be entered thereon in accordance with the Settlement Agreement dismissing this litigation on the merits and with prejudice as to Reavis & McGrath; *provided however*, that a member of the Class may only contest the approval of the proposed settlement if his objection is submitted in writing and filed with the Court postmarked not later than _____, 1985, showing thereon delivery of a copy of such written objection to, Joan M. Hall, Esquire, Jenner & Block, One IBM Plaza, Chicago, Illinois 60611, attorneys for Reavis & McGrath, and Karl Cambronne, Esquire, Chestnut & Brooks, P.A.,

900 Norwest Midland Building, Minneapolis, Minnesota 55401, attorneys for the Claimants.

No members of the Class shall be entitled in any way to contest the approval of the terms and conditions of the proposed settlement, or, if approved, the judgment to be entered thereon pursuant to the Settlement Agreement, unless he has served and filed written objections in accordance with the preceding paragraph. Any member of the Class who fails to object in the manner prescribed shall be deemed to have waived, and shall be foreclosed forever from raising, any objections except upon permission of the Court for good cause shown.

In the event that the hearing on this partial settlement on _____, 1985, does not resolve all questions or objections, the Court may order further proceedings to be held. No further notice will be sent to members of the Class regarding any such continuations of the hearing or related proceedings.

If you approve of the settlement, you need take no further action at this time.

If you have any questions concerning this notice, you may contact in writing the Clerk of the Court, United States District Court, District of Minnesota, P. O. Box 9837, Minneapolis, Minnesota 55440.

All papers filed in this action are available for inspection at the office of the Clerk of the Court.

DATED: Minneapolis, Minnesota
_____, 1985

Charles R. Weiner
United States District Judge
United States District Court
District of Minnesota

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
FOURTH DIVISION

IN RE: FLIGHT TRANSPORTATION CORPORATION SECURITIES LITIGATION	Master Docket No. 4-82-874 M.D.L. 517 Honorable Charles R. Weiner

NOTICE OF HEARING ON PARTIAL SETTLEMENT

TO: ALL MEMBERS OF THE CLASS

You were previously notified of the pendency of this litigation on or about May 31, 1983, and also of partial settlements with certain defendants. The purpose of this notice is to inform you that a partial settlement has been agreed upon by the Claimants' Committee with an additional defendant, subject to the approval of this Court, which would conclude this litigation as to that defendant. A hearing will be held before this Court to determine whether or not the proposed partial settlement will be approved.

As you were previously informed, this litigation involved claims under the federal securities laws, other statutes and under the common law against Flight Transportation Corporation ("FTC") and other defendants arising out of the offer and sale of FTC securities during the period November 30, 1979, through June 18, 1982. The Court has made no determination with respect to the merits of any of the claims or defenses in this litigation.

Agreement has been reached on a proposed partial settlement of this litigation between counsel for Claimants' Committee and counsel for defendants Fox & Company, John E. Harrington ("Harrington"), Norman E. Klein ("Klein"), and Mark Mersman ("Mersman") (and all present and former partners, employees and agents)

(collectively "Fox"). Fox is an accounting firm that audited the financial statements of FTC for its fiscal years ending June 30, 1980 and 1981, and provided unqualified opinions that the company's financial records fairly presented the company's financial condition in accordance with generally accepted accounting principles. These opinions appeared in the prospectuses for the three public securities offerings of FTC in March 1981 and June 1982. Fox specifically disclaims any liability relating to any of the matters alleged in this litigation and expressly denies that it has engaged in any wrongful activity or violated any law or regulation or that any person has suffered any harm or damage as a result of the matters alleged as to it.

The terms and conditions of the proposed partial settlement are set forth in the actual Settlement Agreement, a copy of which is on file with the Clerk of this Court. There follows a brief summary of the terms and conditions of the Settlement Agreement, which is subject to the approval of the Court:

1. Fox has placed in an interest-bearing escrow account the sum of $5,200,000.00 pending final approval of the proposed settlement. Provided that this proposed settlement is approved, (a) the $5,200,000.00 plus all accrued interest thereon will be contributed to a central fund for payment of claims of the Class members and creditors of FTC, in accordance with the Sharing Agreement entered into by the members of the Plaintiff Class and Plaintiff Subclasses, the receiver of FTC and participating creditors of FTC ("Settling Claimants") approved by the Court in July 1983, as modified by the Eighth Circuit; and (b) all claims which have been or could have been asserted in this litigation by Settling Claimants against Fox will be dismissed on the merits and with prejudice. Upon the Court's entry of the Order and Judgment approving the Fox Settlement, Fox, its partners, employees and agents, past, present, and future, shall, without further act by any person, be released from, and each and every member of

the Class and the Settling Claimants shall be permanently barred and enjoined from instituting or prosecuting, any claim, demand, right or cause of action arising out of or relating to any of the acts, omissions or other matters that were asserted or could have been asserted against Fox in this litigation or in any other litigation arising out of or relating to FTC.

2. The litigation will continue against any non-settling defendants herein.

3. Fox, its partners, employees and agents, past, present, and future, will be indemnified with respect to claims against them by any person arising out of or relating to any transaction or occurrence involving FTC and Fox as more fully set forth in the Settlement Agreement.

4. If this proposed settlement is not finally approved by the Court, the funds held in escrow pursuant to the Settlement Agreement will be returned to Fox, and the litigation will proceed as if no settlement had been proposed.

A hearing shall be held before the Court at 10:00 a.m. C.D.T. on September 13, 1985, in the United States Courthouse, 110 South Fourth Street, Minneapolis, Minnesota 55401, for the purpose of determing whether the proposed settlement is fair, reasonable and adequate and should be approved by the Court.

Any member of the Class who objects to the approval of the proposed settlement may appear at the hearing and show cause, if any he has, why the proposed settlement should not be approved as fair, reasonable and adequate and why a judgment should not be entered thereon in accordance with the Settlement Agreement dismissing this litigation on the merits and with prejudice as to Fox; *provided however,* that a member of the Class may only contest the approval of the proposed settlement if his objection is submitted in writing and filed with the Court postmarked no later than August 30, 1985, show-

ing thereon delivery of copy of such written objection to Edward M. Glennon, Esquire, Lindquist & Vennum, 4200 IDS Center, Minneapolis, Minnesota 55402, attorneys for Fox, and Jack L. Chestnut, Esquire, and John Cochrane, Esquire, c/o Chestnut & Brooks, P.A. 900 Norwest Midland Bank Building, Minneapolis, Minnesota 55401, attorneys for the Claimants.

No member of the Class shall be entitled in any way to contest the approval of the terms and conditions of the proposed settlement, or, if approved, the judgment to be entered thereon pursuant to the Settlement Agreement, unless he has served and filed written objections in accordance with the preceding paragraph. Any member of the Class who fails to object in the manner prescribed shall be deemed to have waived, and shall be foreclosed forever from raising, any objections except upon permission of the Court for good cause shown.

In the event that the hearing on this partial settlement on September 13, 1985, does not resolve all questions or objections, the Court may order further proceedings to be held. No further notice will be sent to members of the Class regarding any such continuations of the hearing or related proceedings.

If you approve of the settlement, you need take no further action at this time.

If you have any questions concerning this notice, you may contact in writing Karl Cambronne, Chestnut & Brooks, P.A., 900 Norwest Midland Bank Building, Minneapolis, Minnesota 55401.

All papers filed in this action are available for inspection at the office of the Clerk of the Court.

U. S. COURT OF APPEALS - EIGHTH CIRCUIT
APPELLANT'S FORM A
Appeal Information Form
To be filed with the Notice of Appeal

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HARRIS TRUST AND SAVINGS BANK
Appellant/Appellee,

vs.

FOX AND COMPANY, REAVIS & MCGRATH, ET. AL.
Appellant/Appellee.

DATE OF DISTRICT
COURT JUDGMENT: December 19, 1986

BASIS OF:
DISTRICT COURT JURISDICTION: 28 U.S.C. §1332
APPELLATE JURISDICTION: 28 U.S.C. §1291

IS THIS CASE SUITABLE FOR CONSIDERATION IN THIS COURT'S SETTLEMENT PROGRAM?

(x) Yes. ( ) No. If no, state why:

APPROPRIATE STANDARD OF APPELATE REVIEW:
ERROR OF LAW: DE NOVO REVIEW

LIST ISSUES ON APPEAL: (List below and if necessary attach supplementary page.)

Optional–Include citations for each issue and in jury cases attach challenged instructions and trial memoranda.

DOES THIS CONSTITUTE YOUR STATEMENT OF ISSUES UNDER FRAP 10(b) (3)? (x)Yes. ( )No.

WHETHER a District Court can properly approve a settlement over the objections of class members, which requires the parties to dismiss a pending Petition for Writ of Certiorari in the United States Supreme Court concerning the adequacy, fairness and reasonableness of a prior settlement?

WHETHER a District Court can properly approve a settlement which imposes financial obligations upon absent class members without adequate notice and an opportunity to be heard?

Submitted by: _____
Signature

United States Court of Appeals

For The Eighth Circuit

No. 87-5075MN

Harris Trust and Savings Bank,
Appellant,

vs.

Thomas C. Bartsh, etc., et al.,
Appellees.

Appeal from the United States District Court for the District of Minnesota

Appellant Harris Trust and Savings' motion for a stay is denied. Appellant's brief is due April 10, 1987.

March 19, 1987

Order Entered Under Rule 5(a):

Clerk, U. S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

In re: Flight Transportation Corporation Securities Litigation	No. 87-5075-MN **MOTION TO STAY APPEAL**

NOW COMES the Appellant, Harris Trust & Savings Bank ("Harris Trust"), by and through it's attorneys, and moves this Honorable Court pursuant to Rules 26(b) and 27 of the Federal Rules of Appellate Procedure for the United States Court of Appeals and Rules 4 and 9 of the Eight Circuit Rules of Appellate Procedure, to stay this appeal pending resolution of a Petition for Certiorari in the United States Supreme Court which is related to the issues presented in this appeal. In support of its motion, Harris Trust respectfully states as follows:

1. On January 14, 1987, Harris Trust, filed a notice of appeal from the order dated December 15, 1986 which was by the Honorable Charles R. Weiner in these class action proceedings. Pursuant to order of this Court, Harris Trust's brief as appellant herein, is due on or before March 23, 1987.

2. Harris Trust appealed from the December 15, 1986 Order entered by Judge Weiner because, in part, it approved an amendment of a class action settlement which provided that Subclass IV (of which Harris Trust is a member) agree to voluntarily dismiss a petition for Certiorari which is currently pending in the United States Supreme Court. *(See, e.g., Subclass IV (Unitholders) v. Fox & Company, Reavis & McGrath, et al.* Case no. 86-715, currently pending in the United States Supreme Court).

3. On February 12, 1987, Harris Trust filed a supplemental Brief in support of the pending Petition for Certiorari which was previously filed by its Subclass IV Representatives. Harris Trust believes that the United States Supreme Court should be given the opportunity to

rule upon the Petition for Certiorari on the merits.

4. The Respondents are currently scheduled to file their response to the pending Petition for Certiorari on or before March 27, 1987. Accordingly, the Petition for Certiorari should be ruled upon on the merits by the United States Supreme Court within the next few months.

5. The resolution of the pending Petition for Certiorari may resolve some of the issues presented in the appeal.

6. Accordingly, Harris Trust requests that this Court stay this appeal pending resolution of the Petition for Certiorari in the United States Supreme Court.

Respectfully submitted,

Dated: March 16, 1987 HARRIS TRUST & SAVINGS BANK

By: _____
One of its attorneys

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February 26, 1987

THOMAS C. BARTSH
PHILLIP S. RESNICK
STEPHEN D. GARRISON
ROBERT B. PATTERSON, JR.
BRIAN W. RUDE

JAMES C. DIRACLES ESQ.
Best & Flanagan
3500 IDS Center
Minneapolis, Minnesota 55402

Re: Flight Transportation Corporation Amendment to Sharing Agreement Concerning Subclass IV By and Among Claimants

Dear Mr. Diracles:

This letter is to confirm that the Plaintiffs' Steering Committee and myself agree that the period for receiving "FINAL APPROVAL" for the Amendment to the Sharing Agreement pursuant to paragraph 6 of said Amendment shall be extended from February 28, 1987, until April 30, 1987. I have not polled the Creditors since the Amendment to the Sharing Agreement affecting them has been approved, and is Final. They will be paid on March 2, 1987. They are thus, for all practical purposes done with the litigation.

It is my understanding that you are also in agreement to extend the time under which "FINAL APPROVAL" must be obtained for the Amendment to the Sharing

Agreement to April 30, 1987. Please sign the enclosed copy of this letter and return it to me indicating your agreement.

Sincerely,
RESNICK & BARTSH
Professional Association

Thomas C. Bartsh, As Receiver of
Flight Transportation Corporation
and On Behalf of the Plaintiffs'
Steering Committee

ON BEHALF OF SUBCLASS IV, I agree to amend Paragraph 6 of the Amendment to Sharing Agreement to extend the time under which "FINAL APPROVAL" may be obtained until April 30, 1987.

JAMES C. DIRACLES

cc: JACK CHESTNUT, Esq.
JEFF SMITH Esq.
JAMES SAFLEY, Esq.
EDWARD CALLAHAN, Esq.

Supreme Court, U.S.
FILED
MAR 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-715

IN THE

Supreme Court of the United States

October Term, 1986

IN RE FLIGHT TRANSPORTATION CORPORATION SECURITIES LITIGATION

SUBCLASS IV (UNITHOLDERS),

Petitioners,

vs.

FOX & COMPANY, REAVIS & McGRATH, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Edward M. Glennon
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Counsel for Respondent Fox & Company

1987—Northwest Printing Co., 3010 2nd St. No., Minneapolis, MN 55411—588-7506

15 pp

QUESTIONS PRESENTED

1. Whether the District Court denied due process to absent class members who received notice of indemnification provisions contained in certain settlement agreements and whose counsel appeared and objected on their behalf at a hearing held to determine whether the settlement agreements were fair, reasonable and adequate?

2. Whether by not modifying the indemnification provisions in certain settlement agreements presented to it and instead giving an objecting subclass the chance to "opt-out" and proceed to trial, the District Court coerced that subclass into accepting a settlement that it did not want?

3. Whether the Eighth Circuit's opinion is correct and does not conflict with any decisions of this court?

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TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1986

No. 86-715

IN RE FLIGHT TRANSPORTATION
CORPORATION SECURITIES LITIGATION

SUBCLASS IV (UNITHOLDERS),

Petitioners,

vs.

FOX & COMPANY,
REAVIS & McGRATH, ET AL.,

Respondents.

ON PETITION FOR A
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

Subclass IV, one of five subclasses of investors in Flight Transportation Corporation ("FTC") securities, has asked the Court to review a decision of the United States Court of Appeals for the Eighth Circuit that upheld the District Court's approval of seven separate settlement agreements in the FTC Securities Litigation. The settlement agreements effectively brought the FTC litigation to a close.

In April of 1983, FTC shareholders and creditors entered into a "Sharing Agreement." That Sharing Agreement, approved by an earlier decision of the Eighth Circuit,[1] settled shareholder and creditor disputes regarding an escrow fund[2] and placed all recoveries from the FTC litigation into one fund to be distributed according to the Sharing Agreement's terms. The Sharing Agreement provided that out of the first $30 million in recoveries, Subclass IV, composed largely of financial institutions, would recover $12.5 million. The escrow fund alone contained approximately $25 million; therefore, once the Receiver sold some of FTC's assets and settled with one of the principals and FTC's insurance company, Subclass IV had locked in payment of at least 86% of its claims.[3] In fact, in late 1984, Subclass IV received $11 million, or 76%, toward the payment of those claims. No other subclass has received any funds to date.[4]

After extensive negotiations over a period of months, seven separate settlements were reached. The class members were sent notice of the settlements, including the indemnification provisions, and were given the opportunity to appear at a hearing and voice their objections. At the hearing, counsel for Subclass IV appeared and objected to the indemnification provisions contained in those settlement agreements.

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[1]*In re Flight Transportation Corp. Securities Litigation*, 730 F.2d 1128 (8th Cir. 1984).

[2]The escrow fund contained the proceeds of the sale of FTC securities pursuant to FTC's June 3 and 4, 1982, Registration Statements. The proceeds from the sale totaled approximately $25 million with interest.

[3]The 86% figure is based on $14,597,458 in total approved claims for Subclass IV.

[4]With the exception of some investors who last year agreed to take a lesser sum than they would have been entitled to receive if they had waited until the litigation was complete to receive their funds.

The District Court then approved the settlements as fair, reasonable and adequate in a well-reasoned opinion addressing all legitimate concerns raised by the Subclass IV. The District Court gave the objectors the option to renounce their rights under the Sharing Agreement and go to trial if they did not approve of the settlements. Subclass IV, not willing to give up the favorable position it had under the Sharing Agreement or the $11 million that it had already received under the terms of that Sharing Agreement, appealed to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals, after considering Subclass IV's claims within the context of the entire FTC litigation, determined that the District Court's decision contained no error of law, abuse of discretion, or clearly erroneous finding of fact.

REASONS FOR DENYING THE WRIT

I.

ABSENT CLASS MEMBERS WHO RECEIVED NOTICE OF INDEMNIFICATION PROVISIONS CONTAINED IN THE SETTLEMENT AND WHOSE COUNSEL APPEARED AND OBJECTED ON THEIR BEHALF WERE NOT DENIED DUE PROCESS.

Subclass IV attempts to create a due process issue by claiming that the notice of class action did not inform absent plaintiff class members that affirmative financial obligations might be imposed upon them.[1] It would have been improper, however, for the notice of class action to include such information:

---

[1]Subclass IV's counsel has never purported to represent any other investors than those within Subclass IV, and no other subclasses have appealed the District Court's Order. Thus, when Subclass IV refers to "absent class members," it must be referring to those within Subclass IV. Subclass IV, however, contains only a few institutional investors who, upon information and belief, remained in close contact with the litigation at all times.

> [S]ome decisions authorize notice to the class to include notice of defense counterclaims, possible subjection to interrogatories, and potential cost liability to absentees who remain in the class. Apart from the questionable nature of these aspects of the class notice as a matter of law, inclusion of such items in a class notice constitutes a rather effective disincentive for remaining in the class. Such discouragement of absent members — at least as long as these items in the class notice are unsettled at best — appears contrary to the important objective of retaining neutrality and may actually mislead absent class members concerning their rights and exposures in the action. Accordingly, no reference to these items has been made in most class notices.

2 Newberg on Class Actions § 8.31 at 159 (2d ed. 1985). The class members *did,* however, receive notice of the indemnification provisions after they became part of the settlement agreements and before the District Court approved those agreements.[2]

In addition, the absent class members' interests were adequately represented. "Adequacy of representation, rather than notice, is the touchstone of due process in a class action."[3] Subclass IV's counsel appeared at the hearing and objected to the indemnification provisions in the settlement agreements, and the District Court took those objections into consideration in determining whether the settle-

---

[2]The notice sent to the class in July, 1985 regarding the Fox settlement states that "Fox, its partners, employees and agents, past, present and future, will be indemnified with respect to claims against them by any person arising out of or relating to any transaction or occurrence involving FTC and Fox as more fully set forth in the Settlement Agreement." It also states that "[a]ll papers filed in this action are available for inspection at the office of the Clerk of Court."

[3]2 Newberg on Class Actions § 11.52 at 469 (2d ed. 1985).

ment agreements were fair, reasonable and adequate. Therefore, the District Court did not deny the absent class members due process. Because due process was not denied, the petition for certiorari should not be granted.

II.

BY REFUSING TO MODIFY THE SETTLEMENT AGREEMENTS AND, INSTEAD, GIVING AN OBJECTING SUBCLASS THE CHANCE TO "OPT-OUT" AND PROCEED TO TRIAL, THE DISTRICT COURT DID NOT COERCE THAT SUBCLASS INTO ACCEPTING A SETTLEMENT IT DID NOT WANT.

Subclass IV requested the District Court to *modify* the settlement agreements "so as to clarify that the Settling Claimants will not be required to personally provide a legal defense in any future actions or to indemnify the defendants in such actions." Memorandum of Law and Fact in Support of Objection to Proposed Settlements, August 29, 1985. Subclass IV never asked the District Court to disapprove the settlement agreements; it only proposed new indemnification language to be substituted in the settlement agreements. The District Court was not empowered, however, to rewrite the agreement between the parties:

> The options available to the District Court were essentially the same as those available to respondents: it could have accepted the proposed settlement; it could have rejected the proposal and postponed the trial to see if a different settlement could be achieved; or it could have decided to try the case. The District Court could not enforce the settlement on the merits and award attorney's fees any more than it could, in a situation in which the attorney had negotiated a large fee at the expense of the plaintiff class, preserve the fee award and order greater relief on the merits.

Evans v. Jeff D., ... U.S. ..., ..., 106 S. Ct. 1531, ..., *reh'g denied*, ... U.S. ..., 106 S. Ct. 2909, (1986); Manual for Complex Litigation, Second § 30.41 (1986). The District Court in this case could not modify the settlement agreements submitted to it; it could only accept them or reject them. The District Court properly decided to accept them, but it also gave Subclass IV the chance to "opt-out" and proceed to trial. If Subclass IV had opted out in 1983 when it was originally given the chance to do so, it would not have received the $11 million toward recovery of its claims. Therefore, the District Court's requirement that Subclass IV return the money it had received before proceeding to trial was a reasonable one. Without that requirement, Subclass IV would have been allowed to remain in the litigation long enough to obtain a 76% recovery on its claims and then opt-out of settlements that would have brought in funds for the other subclasses. The Manual for Complex Litigation states that "the Court should not permit representatives, in violation of their fiduciary responsibilities, to become overly concerned with their individual interests and unfairly impede a desirable settlement on behalf of the class."[4] Similarly, Subclass IV, the only subclass to have received any funds to date, could not be permitted by the District Court to impede a desirable settlement on behalf of the remaining subclasses. Therefore, the District Court's actions were reasonable and in no way coercive; consequently, the petition for certiorari lacks merit and should be denied.

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[4]Manual for Complex Litigation, Second § 30.43 (1986).

III.

THE EIGHTH CIRCUIT'S OPINION IN THIS CASE IS CORRECT AND DOES NOT CONFLICT WITH DECISIONS OF THIS COURT.

In order to comply with the requirements of Rule 17 of this Court, Subclass IV has made a veiled attempt to create a conflict between the Eighth Circuit's decision and decisions of this Court. When studied carefully, however, no conflict actually exists.

The holding of this Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. . . ., 105 S. Ct. 2965 (1985), in no way conflicts with the District Court's decision in this case. In *Phillips Petroleum*, this Court, in dicta, states that absent plaintiff class members are "*almost* never subject to counterclaims or cross-claims, or liability for fees and costs."[5] *Id.* at . . ., 2977 (emphasis added). Thus, even if "due process strictly circumscribes the burdens which may be placed on absent plaintiff class members,"[6] this Court has recognized that there may be some instances where absent class members will be subject to liability.[7]

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[5]At least one other district court has approved a class action settlement that might ultimately result in plaintiff class members "having to pay some monies." *Sommers v. Abraham Lincoln Federal Savings & Loan Association*, 79 F.R.D. 571, 579 (E.D. Pa. 1978).

[6]Brief of Petitioner at 13.

[7]This case, however, simply will not be one of those instances. Fox & Company entered into its settlement agreement nearly two years ago. At that time, at least one major defendant had not settled with the plaintiffs, and it had substantial cross-claims outstanding against Fox & Company. Since that time, all the defendants have now settled, and within their settlement agreements, they have assigned all of their claims to the plaintiffs. It has been over a year and a half since the District Court approved the settlement agreements, and not one new claim has been filed. The criminal trials of the FTC principals also have been completed, and no new claims have come to light as a result. With only one year remaining on the statute of limitations, although "one can conceivably spin out scenarios which would require these provisions to be invoked," the reality is that the possibility of such scenarios reaching fruition is now nonexistent.

Subclass IV also attempts to argue that the Eighth Circuit's decision conflicts with this Court's decision in *Evans v. Jeff D.*[8] In *Evans,* however, the parties were not given the option to reject the settlement and proceed to trial. Further, the decision of the Court of Appeals in *Evans,* which was overturned by this Court, did exactly what Subclass IV requested the District Court to do in this case. In *Evans,* the Court of Appeals upheld one portion of a settlement agreement and rejected another portion. It was in that context that this Court found it unacceptable that the parties were being required to accept a settlement agreement to which they had not agreed. Therefore, the Eighth Circuit's decision does not conflict with *Evans.*

In addition, Subclass IV claims that the Eighth Circuit's opinion conflicts with the decision of the United States Court of Appeals for the Seventh Circuit in *In re General Motors Corp. Engine Interchange Litigation,* 594 F.2d 1106 (7th Cir. 1979), *cert. denied,* 444 U.S. 870 (1980). In that case, the Seventh Circuit stated that a federal district court cannot force a class to settle state law claims that are not pending in the federal action. Once again, no conflict actually exists. The District Court did not force anyone to accept any of the settlements. The District Court gave Subclass IV the option to return the funds it had received under the Sharing Agreement and proceed to trial. Subclass IV attempts to argue that the District Court's offer was not a legitimate one and was instead a "novel attempt" to circumvent the prohibition against court-imposed settlements. The Eighth Circuit correctly noted, however, that "[i]t would certainly not have been fair to permit Subclass IV, which to date has received over $11,000,000 in cash, much

[8] ___ U.S. ___, 106 S. Ct. 1531 (1986).

more than received by other members of the plaintiff class, to retain this money while also rejecting the present settlements." *In re Flight Transportation Corp. Securities Litigation,* 794 F.2d 318, 321 (8th Cir. 1986).

The District Court made a finding of fact that the indemnification provisions posed a risk to Subclass IV that was tolerable. The Eighth Circuit determined that that finding of fact was not clearly erroneous. The Eighth Circuit was correct when it stated:

> When Subclass IV accepted substantial cash payments under the Sharing Agreement, it knew that further settlement negotiations would be taking place against certain defendants, and that results of the negotiations would be submitted to the District Court for approval. The requirement of Court approval protected it against unfair imposition and, as a last resort, the Subclass also retains the right to go to trial against the settling defendants, provided always that it may not take the benefit of this course of settlement negotiations without also assuming the burdens which other members of the plaintiff class have assumed.

794 F.2d at 321-22.

The District Court's decision, and the Eighth Circuit's decision upholding it, are both well-reasoned opinions. Neither decision conflicts with any of the decisions of this Court; neither decision will affect any more persons than the parties to this litigation. Thus, both decisions should be allowed to stand.

CONCLUSION

For the reasons set forth above, Fox & Company respectfully urges that the petition for a writ of certiorari be denied.

Respectfully submitted,

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No. 86-715

IN THE

Supreme Court of the United States

October Term, 1986

IN RE FLIGHT TRANSPORTATION CORPORATION SECURITIES LITIGATION

SUBCLASS IV (UNITHOLDERS),

Petitioner,

vs.

FOX & COMPANY, REAVIS & McGRATH, ET AL.,

Respondents.

PETITIONER'S SUPPLEMENTAL REPLY BRIEF TO SUPPLEMENTAL BRIEF OF HARRIS TRUST AND SAVINGS BANK

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PETITIONER'S SUPPLEMENTAL REPLY BRIEF TO SUPPLEMENTAL BRIEF OF HARRIS TRUST AND SAVINGS BANK

INTRODUCTION

Petitioner, Subclass IV ("Unitholders") files this Supplemental Reply Brief pursuant to Supreme Court Rule 22.6 in response to the Supplemental Brief filed by Harris Trust & Savings Bank ("Harris Bank"). Harris Bank's characterization of the intervening matters is incomplete and Petitioner wishes to inform the Court of certain matters which have occurred since Petitioner's last filing.

I.

The Agreement to Dismiss the Petition is the Product of a Negotiated Agreement.

After filing the Petition for Writ of Certiorari with this Court, Petitioner negotiated a settlement which confers substantial benefits on Subclass IV. The Agreement[1], which is in the form of an Amendment to the Sharing Agreement, the initial settlement in this case, provides for a final allocation of more than $2,800,000 to Subclass IV which will not be reduced by attorneys' fees for counsel for the other subclasses. It also provides for the expeditious distribution of the final settlement proceeds to each subclass member. In return for the benefits conferred on Subclass IV and in an effort to end Subclass IV's involvement in this case, Petitioner has agreed to request dismissal of this Petition as soon as the District Court's approval of the Agreement is no longer subject to appellate review ("Final Approval").

As with all settlements, counsel and the representatives of Subclass IV made a decision that the benefits to be derived from such a settlement outweigh the detriments. Petitioner did not act in a cavalier manner in agreeing "voluntarily" to dismiss its Petition, but rather has made a carefully reasoned determination that a dismissal was appropriate consideration for the immediate and substantial final distributions to the members of Subclass IV. That decision was approved by the District Court at a hearing after notice to all subclass members and the only objecting member was Harris Bank.

[1]It is Petitioner's understanding that the Agreement along with the other documents referred to herein are being submitted to the Court with Respondents' Brief in Opposition to the Petition.

II.

Harris Bank's Procedural Maneuvers Endanger This Final Settlement.

The Agreement required Final Approval to occur no later than February 28, 1987. If not, the entire Agreement would be null and void. Although the Petitioner and the other parties to the Agreement have extended the deadline for Final Approval to April 30, 1987, the parties to the Agreement do not intend to extend the deadline further because the primary objective of the Agreement is to conclude these proceedings expeditiously for Subclass IV.

Harris Bank has placed the Agreement in jeopardy by its procedural manuvering. It has appealed the District Court's approval of the settlement to the Eighth Circuit. At the same time, it has sought relief from this Court by way of its Supplemental Brief. Since filing the Supplemental Brief, Harris Bank moved to stay its appeal to the Eighth Circuit pending action by this Court. That motion was summarily denied and respondents have filed a motion to dismiss the appeal.

Harris Bank's actions have already delayed the final distribution to Subclass IV. In the judgment of Petitioner, it would be contrary to the best interests of Subclass IV if Harris Bank's actions resulted in the destruction of a favorable, negotiated settlement which would end Subclass IV's involvement in this protracted securities litigation.

CONCLUSION

In reviewing Harris Bank's Supplemental Brief, the Court should consider the substantial benefits conferred on Subclass IV by the Agreement and the importance of respecting a negotiated arrangement to expediously conclude Subclass IV's involvement in this case.

Respectfully submitted,

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